92-203
No. ____

SUPREME COURT, U.S.
FILED
JUL 30 1992
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

ARKANSAS-PLATTE & GULF PARTNERSHIP,
Petitioner,

v.

THE DOW CHEMICAL COMPANY and
VAN WATERS & ROGERS, INC.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y, preempts state common-law tort claims that are based on inadequate labeling of pesticide products or failure to warn about the harmful effects of such products.

2. Whether the statutory and regulatory regime that was established after FIFRA was amended in 1972 now operates to preempt state common-law tort claims that are based on the inadequacy of labels on, or warnings relating to, pesticide products that were distributed and sold prior to the 1972 amendments to FIFRA.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. THE TENTH CIRCUIT'S HOLDING THAT FIFRA IMPLIEDLY PREEMPTS STATE COMMON-LAW TORT CLAIMS OF INADEQUATE LABELING OR FAILURE TO WARN, LIKE THE ELEVENTH CIRCUIT'S SIMILAR HOLDING IN *PAPAS*, MUST NOT BE PERMITTED TO STAND AS BINDING OR PERSUASIVE AUTHORITY WITHOUT REVIEW OR RECONSIDERATION IN LIGHT OF THIS COURT'S DECISION IN *CIPOLLONE*	8
II. THE TENTH CIRCUIT'S HOLDING ON PREEMPTION BY POST-1972 FIFRA EXPRESSLY REJECTS THE D.C. CIRCUIT'S HOLDING ON THE SAME ISSUE AND CONFLICTS WITH SUBSEQUENT HOLDINGS OF THE FOURTH CIRCUIT AND ONE STATE COURT OF LAST RESORT; MOREOVER, THERE IS A GREAT AND RECURRING SPLIT OF AUTHORITY ON THE ISSUE IN FEDERAL AND STATE COURTS THAT SHOULD BE RESOLVED BY THIS COURT	12

TABLE OF CONTENTS—Continued

Page

III. IN HOLDING THAT THE STATUTORY AND REGULATORY REGIME THAT WAS ESTABLISHED AFTER FIFRA WAS AMENDED IN 1972 NOW OPERATES TO PREEMPT COMMON-LAW TORT CLAIMS THAT ARE BASED ON THE INADEQUACY OF LABELS ON, OR WARNINGS RELATING TO, PESTICIDE PRODUCTS THAT WERE DISTRIBUTED AND SOLD PRIOR TO THE 1972 AMENDMENTS TO FIFRA, THE TENTH CIRCUIT HAS IGNORED CONTRARY CONGRESSIONAL INSTRUCTIONS AND HAS DECIDED A MATTER OF STATUTORY RETROACTIVITY IN A WAY THAT CONFLICTS WITH THE DOMINANT STRAND OF APPLICABLE DECISIONS OF THIS COURT, INCLUDING THE DECISION IN *CIPOLLONE* 17

IV. IN HOLDING THAT THE CURRENT FIFRA PREEMPTS STATE COMMON-LAW TORT CLAIMS OF INADEQUATE WARNING OR LABELING, THE TENTH CIRCUIT HAS WRONGLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT 23

CONCLUSION 27

APPENDIX

Opinion of the United States Court of Appeals for the Tenth Circuit, dated March 6, 1992 ..... 1a

Order by the United States District Court for the District of Colorado denying motion for summary judgment, dated October 22, 1990 ..... 14a

TABLE OF CONTENTS—Continued

Page

Order by the United States District Court for the District of Colorado denying motion for reconsideration and certifying matter for interlocutory appeal, dated January 22, 1991 ..... 34a

Order by the United States Court of Appeals for the Tenth Circuit granting petition for leave to appeal, dated February 26, 1991 ..... 36a

Order by the United States Court of Appeals for the Tenth Circuit denying petition for rehearing and suggestion for rehearing en banc, dated April 16, 1992 ..... 37a

Order by Byron R. White, Associate Justice of the Supreme Court of the United States, extending the time for filing a petition for a writ of certiorari, dated July 1, 1992 ..... 39a

TABLE OF AUTHORITIES

Cases: Page

Abelman v. Velsicol Chem. Corp., No. 12611 (Md. Cir. Ct. Montgomery County May 17, 1991) 16
Badaracco v. Comm'r of Internal Revenue, 464 U.S. 386 (1984) 21
Begley v. Truly Nolan Exterminating, Inc., 573 S.2d 1038 (Fla. Dist. Ct. App. 1991) 16
Bennett v. New Jersey, 470 U.S. 632 (1985) 22
Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) 20
Bradley v. School Bd. of City of Richmond, 416 U.S. 696 (1974) 20, 21
Brennan v. Dow Chem. Co., No. CL-90-8882 AO (Fla. Cir. Ct. Palm Beach County June 3, 1991) 16
Brooks v. S.C. Johnson & Son, Inc., No. 86-4136 (S.D. Ill. Jan. 10, 1990) 15
Cannon v. Chapman Chem. Co., No. 88-2252 (W.D. Ark. Mar. 5, 1990) 15
Chavolla v. Shell Chem., No. 548003 (Cal. Super. Ct. May 31, 1990) 16
Chem. Specialties Mfrs. Ass'n, Inc. v. Allenby, 958 F.2d 941 (9th Cir. 1992), *petition for cert. filed*, 60 U.S.L.W. 3844 (U.S. June 4, 1992) (No. 91-1957) 16
Ciba-Geigy Corp. v. Alter, 309 Ark. 426, 1992 Ark. LEXIS 382 (1992) 13, 14
Cipollone v. Liggett Group, Inc., 893 F.2d 541 (3d Cir. 1990), *rev'd in part as to other matters*, 60 U.S.L.W. 4703 (U.S. June 24, 1992) 11
Cipollone v. Liggett Group, Inc., 60 U.S.L.W. 4703 (U.S. June 24, 1992) 8-11, 16, 23-26
Cox v. Velsicol Chem. Corp., 704 F. Supp. 85 (E.D. Pa. 1989) 15
Darrow v. Vacudyne, Inc., No. 88-CV-40456-FL, 1990 U.S. Dist. LEXIS 19564 (E.D. Mich. April 30, 1990) 15
Davidson v. Velsicol Chem. Corp., No. A-246535 (Nev. Dist. Ct. Clark County Apr. 5, 1991) 16

TABLE OF AUTHORITIES—Continued

Page

Evenson v. Osmose Wood Preserving, Inc., 760 F. Supp. 1345 (S.D. Ind. 1990) 15
Feldman v. Lederle Lab., 592 A.2d 1176 (N.J. 1991), *cert. denied*, 60 U.S.L.W. 3878 (1992) 16
Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984) 6, 7, 12-15, 16, 25
Fisher v. Chevron Chem. Co., 716 F. Supp. 1283 (W.D. Mo. 1989) 15
Fitzgerald v. Mallinckrodt, Inc., 681 F. Supp. 404 (E.D. Mich. 1987) 14, 15
Fullmer v. Arab Termite & Pest Control, Inc., No. 29C 018907 CT415 (Ind. Cir. Ct. Hamilton County May 24, 1991) 16
Goldstein v. California, 412 U.S. 546 (1973) 22
Griffin v. Planters Chem. Corp., 302 F. Supp. 937 (D. S.C. 1969) 19
Herr v. Carolina Log Bldgs., Inc., 771 F. Supp. 958 (S.D. Ind. 1989) 15
Hubbard-Hall Chem. Co. v. Silverman, 340 F.2d 402 (1st Cir. 1965) 19
In re "Agent Orange" Product Liability Litigation, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981) 12, 19
Kennan v. Dow Chem. Co., 717 F. Supp. 799 (M.D. Fla. 1989) 15
Lohf v. Casey, 466 F.2d 618 (10th Cir. 1972) 6, 21
Lorillard v. Pons, 434 U.S. 575 (1978) 25
Mims v. Mobay Corp., No. M-88-157 (S.D. Tex. June 6, 1991) 15
Miranda v. Shell Oil Co., No. 188845 (Cal. Ct. App. Apr. 22, 1992) 16
Montana Pole & Treating Plant v. I.F. Laucks and Co., 775 F. Supp. 1339 (D. Mont. 1991) 15
Muncy v. Magnolia Chem. Co., 437 S.W.2d 15 (Tex. Civ. App. 1968) 19
National By-Products, Inc. v. Pope, No. 91-5665 (6th Cir. Apr. 6, 1992) 14

TABLE OF AUTHORITIES—Continued

Page

Packowski v. Orkin Exterminating Co., No. 85-46671-NI (Mich. Cir. Ct. Kent County May 5, 1989) 16

Papas v. Upjohn Co., 926 F.2d 1019 (11th Cir. 1991), *cert. granted, judgment vacated, and case remanded sub nom. Papas v. Zoecon*, 60 U.S.L.W. 3878 (U.S. June 29, 1992) 6-7, 8-11, 13-17

Papas v. Zoecon, 60 U.S.L.W. 3878 (U.S. June 29, 1992) 10, 24

Perkins v. Northeastern Log Homes, Inc., No. C89-0564-L(M) (W.D. Ky. Feb. 26, 1992) 15

Perry v. Dow Chem. Co., No. CL 88 10227AN (Fla. Cir. Ct. Palm Beach County June 29, 1989) 16

Privette v. Armour Exterminating, No. 85-6279 CA (Fla. Cir. Ct. Palm Beach County Feb. 26, 1988 and Mar. 16, 1988) 16

Riden v. ICI Americas, Inc., 763 F. Supp. 1500 (W.D. Mo. 1991) 15

Roberts v. Dow Chem. Co., 702 F. Supp. 195 (N.D. Ill. 1988) 15

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 18

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 27

Southern Colo. Farms, Inc. v. Green, No. 88 CV 40 (Colo. Dist. Ct. Saguache County June 7, 1991) 16

Villari v. Terminix Int'l, 692 F. Supp. 568 (E.D. Pa. 1988) 15

Whitener v. Reilly Indus., Inc., No. 87-5224 (S.D. Ill. Oct. 25, 1989) 15

Wilson v. Chevron Chem. Co., No. 85 Civ. 762 (JFK) (S.D. N.Y. May 18, 1986) 15

Wisconsin Public Intervenor v. Mortier, 501 U.S. ——, 115 L.Ed.2d 532 (1991) 17, 24

Worm v. American Cyanamid Co., No. 91-1749, 1992 U.S. App. LEXIS 14154 (4th Cir. June 19, 1992) 14, 26

TABLE OF AUTHORITIES—Continued

Page

Young v. American Cyanamid Co., 786 F. Supp. 781 (E.D. Ark. 1991) 15
Yowell v. Chevron Chem. Co., No. 17605, 1992 Mo. App. LEXIS 1193 (Mo. Ct. App. July 13, 1992) 15-16

Federal Statutes:

Federal Environmental Pesticide Control Act of 1972, 86 Stat. 973, Pub. L. No. 92-516 ..5, 17, 20, 21, 23
Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 61 Stat. 163 (1947), as amended, 7 U.S.C. §§ 136-136y ..... *passim*
Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, 102 Stat. 2655 ..... 13, 25
Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819 24

Legislative History:

H.R. Rep. No. 100-939, *reprinted in* 1988 U.S.C.C.A.N. 3474, 3517 25

United States Code:

7 U.S.C. § 136(p) 2
7 U.S.C. § 136t(b) 25
7 U.S.C. § 136v 2, 4, 7, 9-11, 19, 24-27
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1292(b) 4
28 U.S.C. § 1332 3
28 U.S.C. § 1441(a) 3

Federal Regulations:

A. Regulations for the Enforcement of the Federal Insecticide, Fungicide, and Rodenticide Act (published at 24 Fed. Reg. 10,835-66 on Dec. 29, 1959)

7 C.F.R. §§ 362.106(d)(1)-(3) 19
7 C.F.R. § 362.106(h) 18

TABLE OF AUTHORITIES—Continued

Page

7 C.F.R. § 362.109(d) 19
7 C.F.R. § 762.116(d) 18

B. Regulations for the Enforcement of the Federal Insecticide, Fungicide, and Rodenticide Act (1971)

7 C.F.R. Ch. XXVII (1971) 18

C. Current Regulations

40 C.F.R. Part 152 27

Federal Register:

24 Fed. Reg. 10,835-66, Regulations for the Enforcement of the Federal Insecticide, Fungicide, and Rodenticide Act, Part 362 of Title 7, C.F.R. (1959) 18-19
49 Fed. Reg. at 37,971 (1984) 27

Other Authority:

Rules of the Supreme Court of the United States, Rules 10.1(a) & (b) 14

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Arkansas-Platte & Gulf Partnership respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado (App. 14a, *infra*) is reported at 748 F. Supp. 1474 (D. Colo. 1990). The opinion of the United States Court of Appeals for the Tenth Circuit (App. 1a, *infra*) is reported at 959 F.2d 158 (10th Cir. 1992).

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on March 6, 1992. *See* App. 1a. A timely motion for rehearing was denied on

April 16, 1992. *See* App. 37a. On July 1, 1992, Justice White signed an order extending the time within which to file this petition to and including July 31, 1992. *See* App. 39a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y, provides in pertinent part as follows:

> § 136v. Authority of States
>
> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.
>
> * * * *
>
> § 136(p) Label and labeling.—
>
> (1) Label.—The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.
>
> (2) Labeling.—The term "labeling" means all labels and all other written, printed, or graphic matter—
>
> (A) accompanying the pesticide or device at any time, or
>
> (B) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency, the United

States Departments of Agriculture and Interior, the Department of Health and Human Services, State experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.

STATEMENT OF THE CASE

The federal preemption questions presented here arise out of a products liability suit involving pesticide products containing the chemical pentachlorophenol ("penta"). Petitioner Arkansas-Platte & Gulf Partnership ("AP&G") filed its complaint against respondents The Dow Chemical Company ("Dow") and Van Waters & Rogers, Inc., ("Van Waters") in the District Court for the County of El Paso, State of Colorado, on September 1, 1989. Pursuant to 28 U.S.C. § 1441(a), the case was removed to the United States District Court for the District of Colorado, which had original jurisdiction over the case based on diversity of citizenship. 28 U.S.C. § 1332.

In its complaint, AP&G states, in substance, that it owns certain ranch property in Colorado (the "Property") upon which AP&G's predecessors-in-interest operated a wooden fence post treatment facility from approximately 1960 until 1972. AP&G alleges that the wood treatment facility used penta products that were manufactured, supplied, or distributed by the respondents, and that the Property became contaminated with penta and other chemicals contained in those penta products as a result of drips and spills occurring during the course of the wood treatment operation. In the fall of 1987, after AP&G had succeeded to ownership of the Property, one of AP&G's employees on the Property informed AP&G that he had received a medical diagnosis of penta poisoning. Subsequent soil tests revealed penta contamination on the Property. AP&G commenced a remediation program on the Property, incurring substantial expense. AP&G alleges that the respondents' failure to provide

sufficient warnings regarding their penta products, including their failure to provide any caution against soil contamination, was a direct cause of the Property contamination, and AP&G asserts Colorado state tort law claims of negligence and strict liability based on the alleged failure to warn.

On January 31, 1990, Dow filed a summary judgment motion, which Van Waters subsequently joined in. Among other things, the respondents contended that AP&G's state tort law claims of inadequate warning are preempted by FIFRA. The motion was extensively briefed, oral argument was had (at which time the district court denied all grounds for summary judgment except that based on FIFRA preemption), and on October 22, 1990, the court issued its order denying the defendants' motion for summary judgment on FIFRA preemption grounds. *See* App. 14a. The respondents' subsequent motion for reconsideration was denied; however, the district court certified the question of FIFRA preemption for interlocutory appeal to the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1292(b). *See* App. 34a. On February 26, 1991, the court of appeals granted the respondents' petition for leave to appeal under 28 U.S.C. § 1292(b). *See* App. 36a.

The sole issue on appeal was whether the federal government, through FIFRA, has preempted AP&G's state-law tort claims that are based on the respondents' failure to provide adequate warnings about the harmful effects of the penta products that were used on the Property by AP&G's predecessors-in-interest from approximately 1960 to 1972. The respondents argued that AP&G's claims are expressly preempted by 7 U.S.C. § 136v(b), which became part of the FIFRA statute in late 1972, and which prohibits states from "impos[ing] or continu[ing] in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA]." Alternatively, the respondents argued that AP&G's claims are implicitly preempted by (i) the current FIFRA's

occupation of the field of pesticide labeling and (ii) a conflict between AP&G's claims of inadequate warning and the current FIFRA's regulation of pesticides.

In response, AP&G argued that, under the standards of statutory construction set forth by this Court, only the FIFRA statute and regulations in effect prior to the enactment of the 1972 FIFRA amendments should be considered for purposes of the preemption analysis in this case, where the respondents' acts and omissions that gave rise to AP&G's claims occurred prior to the 1972 enactment, and where Congress expressly directed that, for purposes of determining liability to third persons in respect of any act or omission occurring prior to the 1972 FIFRA enactment, FIFRA should be treated as if the 1972 legislation had not been enacted. However, AP&G additionally contended that, whether pre-1972 or current federal law is applied, FIFRA does not preempt AP&G's tort claims under this Court's framework for preemption analysis, where, among other things, (i) there is no evidence of any legislative intent to insulate pesticide manufacturers from common-law liability through FIFRA; (ii) FIFRA provides no alternative relief for persons injured by inadequate pesticide warnings, including warnings that have never even been submitted to or approved by either of the federal agencies that have administered FIFRA; and (iii) the agencies that have administered FIFRA have themselves expressed their belief that FIFRA provides minimum labeling standards, but does not dictate everything that goes on a label and does not relieve a company of its responsibility for providing adequate labeling.[1]

On March 6, 1992, the court of appeals issued its opinion, holding that "state tort actions based on labeling and alleged failure to warn are impliedly preempted by

[1] Under FIFRA, companies draft their own product labels; two different manufacturers may therefore have markedly different labels affixed to their chemically identical products.

FIFRA as a matter of law." *See* App. 13a. In reaching that conclusion, the court first rejected AP&G's contention that the FIFRA preemption analysis in this case should be governed by the FIFRA statute and regulations that were in effect when the respondents' allegedly tortious acts and omissions occurred. In doing so, the court asserted that applying current FIFRA law to past events presents no question of retroactivity, and thus triggers no presumption against retroactive application of a statute, because " 'a statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends are drawn from a time antecedent to the enactment.' " *See* App. 6a (quoting *Lohf v. Casey*, 466 F.2d 618, 620 (10th Cir. 1972)). In addition, the court asserted that "any jury award on claims arising from a duty to label or warn has an impact on FIFRA as it presently exists" because a jury award today would cause manufacturers to change the labels on their products. *See id.* On those grounds, and with no discussion of Congress's express directive to the contrary, the court concluded that the preemption issue should be analyzed under FIFRA as it currently exists. *See* App. 3a-6a.

In the FIFRA preemption analysis that followed, the court began by acknowledging a conflict in the courts regarding the issue of whether the current FIFRA preempts state tort claims based on labeling and alleged failure to warn. *See* App. 7a. The Eleventh Circuit, in a decision recently vacated by this Court, has held such claims to be impliedly preempted. *See Papas v. Upjohn Co.*, 926 F.2d 1019, 1021-26 (11th Cir. 1991), *cert. granted, judgment vacated, and case remanded sub nom. Papas v. Zoecon*, 60 U.S.L.W. 3878 (U.S. June 29, 1992). The D.C. Circuit has held such claims to be neither expressly nor impliedly preempted. *See Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1539-43 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984). In the instant case, the court expressly rejected the D.C. Circuit's holding in

Ferebee, electing instead to follow the Eleventh Circuit's *Papas* decision. In doing so, the court stated that "[s]tate court [sic] damage awards based on failure to warn would constitute ad hoc determinations of the adequacy of statutory labeling standards," which would hinder the accomplishment of FIFRA's purpose of ensuring uniform labeling standards. *See* App. 8a. In addition, the court considered and rejected the D.C. Circuit's distinction between, on the one hand, a state's direct regulatory command that a manufacturer must change its label and, on the other hand, a jury award of damages to compensate a victim of inadequate warning under state tort law. The court found that "[a] business choice between paying damages and changing the label is only notional," and such a choice "cannot be consistent with FIFRA's preclusion of 'any requirements for labeling or packaging in addition to or different from' the statutory mandate," citing 7 U.S.C. § 136v(b). *See* App. 9a-10a. On that basis, the court found AP&G's tort claims based on inadequate warning or labeling to be impliedly preempted by FIFRA, and did not reach the issue of express preemption. *See* App. 13a.

On March 20, 1992, AP&G filed a petition for rehearing, as well as a suggestion for rehearing en banc, on the issue of whether the preemption analysis should be governed by FIFRA amendments that were enacted after the respondents' allegedly tortious acts and omissions occurred. On April 16, 1992, the court summarily denied the petition for rehearing and the suggestion for rehearing en banc. *See* App. 37a.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT'S HOLDING THAT FIFRA IMPLIEDLY PREEMPTS STATE COMMON-LAW TORT CLAIMS OF INADEQUATE LABELING OR FAILURE TO WARN, LIKE THE ELEVENTH CIRCUIT'S SIMILAR HOLDING IN *PAPAS*, MUST NOT BE PERMITTED TO STAND AS BINDING OR PERSUASIVE AUTHORITY WITHOUT REVIEW OR RECONSIDERATION IN LIGHT OF THIS COURT'S DECISION IN *CIPOLLONE*

On June 24, 1992, this Court issued its long-awaited decision in *Cipollone v. Liggett Group, Inc.*, 60 U.S.L.W. 4703 (U.S. June 24, 1992), addressing, among other things, federal preemption of state common-law tort claims of inadequate warning. Though *Cipollone* involved a different federal statute, with different preemptive language and a different regulatory scheme, the plurality opinion in that case set forth an analytical framework for federal preemption cases that is directly applicable to the FIFRA preemption issues raised in this case and in the Eleventh Circuit's *Papas* case, and that further calls into question the reasoning that led each of those circuit courts to conclude that, among other things, state common-law tort claims of inadequate labeling are impliedly preempted by FIFRA.

Central to this Court's preemption analysis in *Cipollone* were two principles of statutory construction. First,

> [w]hen Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' 'there is no need to infer congressional intent to preempt state laws from the substantive provisions' of the legislation. . . . Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted.

60 U.S.L.W. at 4707 (citations omitted). Second, "in light of the presumption against the pre-emption of state police power regulations," *see id.*, preemption should not be inferred unless that is the "clear and manifest" purpose of Congress, *see id.* at 4706, and express preemptive provisions in federal statutes should be narrowly read. *See id.* at 4707.

There is simply no way to reconcile the Eleventh Circuit's analysis in *Papas*, and the Tenth Circuit's analysis in the instant case, with *Cipollone*'s principles of statutory construction. In both *Papas* and the instant case. the preemption analysis was conducted under the current FIFRA statute, which includes, in 7 U.S.C. § 136v(b), a provision that explicitly addresses the issue of preemption. In *Papas*, the Eleventh Circuit admitted to "a little uncertainty" about whether section 136v(b) expressly preempts common-law tort claims of inadequate labeling, and therefore elected to "pass over the question of express preemption," choosing instead to consider whether preemption "can be inferred from FIFRA and the labeling regulations promulgated under it." *Papas*, 926 F.2d at 1024. In the instant case, the Tenth Circuit did not even *reach* the issue of express preemption. *see* App. 13a, and instead used the language of section 136v as a partial basis for concluding that "state tort actions based on labeling and alleged failure to warn are *impliedly* preempted by FIFRA as a matter of law." *Id.* (emphasis added). By "passing over" the question of which state actions were expressly preempted by Congress in section 136v(b) and by using FIFRA's substantive provisions and regulatory scheme to expand section 136v(b)'s preemptive reach through doctrines of implied preemption, the two circuit courts adopted an analytical framework that does not survive *Cipollone*'s directive to give express preemptive provisions both exclusive and narrow effect.

Five days after issuing its decision in *Cipollone*, this Court granted the plaintiffs' petition for a writ of cer-

tiorari in *Papas*, and summarily vacated the Eleventh Circuit's judgment and remanded the case for further consideration in light of *Cipollone*. *See* 60 U.S.L.W. 3878 (U.S. June 29, 1992). In light of the similarity of the issues raised and the analysis undertaken by the circuit courts in *Papas* and the instant case, and in light of the Tenth Circuit's express agreement with and reliance on the Eleventh Circuit's opinion in *Papas*, *see* App. 8a, AP&G respectfully submits that, at a minimum, this Court should permit the Tenth Circuit the same opportunity given to the Eleventh Circuit to reconsider its judgment in light of *Cipollone*. However, AP&G would further point out three additional reasons, not present in *Papas*, that make further review or reconsideration of the Tenth Circuit's judgment in this case appropriate in light of *Cipollone*.

First, as noted earlier, *see supra* at 9, the Tenth Circuit did not even *reach* the issue of express preemption, despite the existence of an express preemptive provision. In bypassing, without comment, the question of section 136v(b)'s express preemptive reach, and moving directly to implied preemption doctrines based on congressional occupation of the field and conflict between state and federal law, *see* App. 13a, the Tenth Circuit's analysis was squarely at odds with the dictates of *Cipollone*.

Second, whereas the Eleventh Circuit's holding of preemption was confined to claims against manufacturers of "EPA-registered pesticides," *see Papas*, 926 F.2d at 1026, the Tenth Circuit's holding in the instant case is not so confined, and therefore more clearly violates *Cipollone*'s admonition that express preemptive provisions are to be narrowly read.[2]

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[2] In this regard, it should be noted that, in both the district and circuit courts in this case, AP&G pointed out that the defendants never produced evidence, in support of their motion for summary judgment, that any federal agency ever determined, through the

Third, and most important, where it is undisputed in this case that AP&G's claims of inadequate warning are based on acts and omissions that occurred prior to the 1972 amendments to FIFRA, including the addition of the express preemption provision of section 136v(b), the Tenth Circuit's decision to analyze the preemption issue under the current FIFRA is contrary to the analysis in *Cipollone*, which applied the federal statute in effect at the time of the allegedly tortious acts and omissions to determine whether later-accruing common-law tort claims based on those acts and omissions would be preempted.[3]

AP&G believes that the Tenth Circuit's opinion clearly warrants review. At a minimum, this Court should, consistent with its treatment of *Papas*, grant this petition for a writ of certiorari, summarily vacate the judgment below, and remand the case to the Tenth Circuit for further consideration in light of *Cipollone*.

FIFRA registration process or otherwise, that the relevant product labels in this case met FIFRA's statutory standards.

[3] *See, e.g.*, 60 U.S.L.W. at 4709 ("insofar as claims under either failure to warn theory require a showing that respondents' post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, those claims are pre-empted"); *cf. id.* at 4716 ("To the extent petitioner's claims are premised specifically on respondents' failure (during the period in which the 1965 Act was in force) to include in their advertising any statement relating to smoking and health, I would find those claims, no less than the similar post-1969 claims, pre-empted.") (opinion of Scalia, J.) (emphasis in original omitted). Moreover, as the Third Circuit's discussion in *Cipollone* makes even clearer, the date on which the plaintiffs' claims arose under state law does not determine which version of the federal statute governs the preemption analysis. *See, e.g., Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 546, 580-81 (3d Cir. 1990) (plaintiffs' claims based upon defendants' behavior prior to the enactment of preemptive statutory language in 1966 were not preempted, even though plaintiffs' claims may not have arisen until 1981 or later, at which time federal statute's preemptive provision was already in effect), *rev'd in part as to other matters*, 60 U.S.L.W. 4703 (U.S. June 24, 1992).

II. THE TENTH CIRCUIT'S HOLDING ON PREEMPTION BY POST-1972 FIFRA EXPRESSLY REJECTS THE D.C. CIRCUIT'S HOLDING ON THE SAME ISSUE AND CONFLICTS WITH SUBSEQUENT HOLDINGS OF THE FOURTH CIRCUIT AND ONE STATE COURT OF LAST RESORT; MOREOVER, THERE IS A GREAT AND RECURRING SPLIT OF AUTHORITY ON THE ISSUE IN FEDERAL AND STATE COURTS THAT SHOULD BE RESOLVED BY THIS COURT

The first federal circuit court decision on the preemptive effect of post-1972 FIFRA on state common-law claims of inadequate warning or labeling was the D.C. Circuit's decision in *Ferebee*, which was issued in 1984.[4] In *Ferebee*, the court considered, and proceeded to reject, a pesticide manufacturer's contention that FIFRA preempts state common-law actions based on inadequate labeling. The court noted that, unlike FIFRA, common-law actions for damages have compensatory, and not merely regulatory, aims. Verdicts against manufacturers in these cases serve the legitimate state goals of providing compensation to injured parties and providing manufacturers with an incentive to submit more detailed or useful labels to the EPA for approval; that the state may not be permitted under FIFRA to directly order a change in an EPA-approved label does not prevent the state from furthering its legitimate goals through the imposition of traditional tort liability. *See* 736 F.2d at 1541-42. Moreover, said the court, Congress has not explicitly preempted state damage actions; nor is compliance with both federal and state law impossible, since a manufacturer can either change its label or continue to use its existing label and simultaneously pay damages

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[4] In 1980, the Second Circuit stated broadly, and perhaps as dicta unnecessary to its disposition of the case, that "FIFRA was not intended to preempt state law even with respect to those matters which it specifically regulates." *See In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987, 995 n.14 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

to successful tort plaintiffs; nor do state damage actions stand as an obstacle to the accomplishment of FIFRA's purposes, since Congress has expressed no clear and manifest purpose to subsidize the pesticide industry through FIFRA by forcing states to accept the use of EPA-registered pesticides and tolerate uncompensated injuries to citizens. *Id.* at 1542-43.

Ferebee stood as the only federal circuit court decision on this preemption issue until the Eleventh Circuit's 1991 *Papas* decision and the Tenth Circuit's decision this year in the instant case. In each of those two later cases, the court acknowledged the holding in *Ferebee* but nevertheless held that FIFRA preempted state tort claims of inadequate labeling or warning. Neither court based its rejection of *Ferebee* on intervening statutory changes; indeed, though FIFRA was extensively revised in 1988, *see* Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, 102 Stat. 2655, Congress made no effort to statutorily overrule the D.C. Circuit's *Ferebee* decision. Neither court attempted to distinguish *Ferebee* on its facts, nor did either court suggest that this Court's framework for preemption analysis had materially changed since *Ferebee*. Instead, the Tenth and Eleventh circuits flatly and unambiguously refused to follow the D.C. Circuit's holding.

Since the Eleventh Circuit's *Papas* decision and the Tenth Circuit's decision in this case, one state court of last resort and one additional federal circuit court have ruled on this FIFRA preemption issue. Both courts expressly acknowledged the conflict among *Ferebee*, *Papas*, and the Tenth Circuit's opinion in this case. In *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 1992 Ark. LEXIS 382 (1992), the Supreme Court of Arkansas, while finding some of the criticism of the *Ferebee* opinion to be justified, nevertheless held that "state common law tort claims for inadequate labeling are neither expressly nor impliedly preempted by FIFRA." 1992 Ark. LEXIS 382, at *13-25.

In *Worm v. American Cyanamid Co.*, No. 91-1749, 1992 U.S. App. LEXIS 14154 (4th Cir. June 19, 1992), a case involving an EPA-registered herbicide, *see* 1992 U.S. App. LEXIS 14154, at *3, the Fourth Circuit took an intermediate position, finding preemption only to the extent that the establishment or enforcement of a common-law duty "would impose a labeling requirement inconsistent with those established by FIFRA." *Id.* at *22. Under that standard, the court noted that state common-law claims "based on breach of a federally imposed standard," *id.* at *21, or based on a state-imposed standard that is identical to the federal standard, *see id.* at *15, would not conflict with federal law and would not be preempted by FIFRA.

As noted above, *supra* at 10, this Court has since vacated the Eleventh Circuit's decision in *Papas*; however, the Tenth Circuit's decision in this case still stands in conflict with the holdings and competing rationales of *Ferebee*, *Alter*, and *Worm*.[5] This conflict warrants resolution by this Court. *See* Rules 10.1(a) & (b), Rules of the Supreme Court of the United States.

Moreover, lower court opinions on this preemption issue show a similarly sharp, direct, widespread, and recurring conflict. In 1987, an opinion issued by the United States District Court for the Eastern District of Michigan rejected the D.C. Circuit's analysis in *Ferebee*, holding instead that FIFRA expressly preempts state tort claims of inadequate warning. *See Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404, 406-08 (E.D. Mich. 1987). Since *Fitzgerald*, federal district courts have variously held

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[5] AP&G would additionally note that the Sixth Circuit has recently affirmed, "[f]or the reasons stated in [the district court's] opinion and order of March 8, 1991," a grant of summary judgment on grounds that included, in the alternative, FIFRA preemption of failure-to-warn claims. *See National By-Products, Inc. v. Pope*, No. 91-5665 (6th Cir. Apr. 6, 1992) (not recommended for full-text publication).

state common-law tort claims of inadequate warning to be expressly preempted,[6] impliedly preempted,[7] and not preempted at all.[8] In at least three federal districts, different judges have reached conflicting holdings.[9] Federal district courts that have had the opportunity to consider the Eleventh Circuit's analysis in *Papas* as well as the D.C. Circuit's analysis in *Ferebee* have reached conflicting results.[10] The numerous opinions from lower state courts on this preemption issue likewise show a widespread conflict.[11]

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[6] *See Herr v. Carolina Log Bldgs., Inc.*, 771 F. Supp. 958 (S.D. Ind. 1989); *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799 (M.D. Fla. 1989).

[7] *See, e.g., Young v. American Cyanamid Co.*, 786 F. Supp. 781 (E.D. Ark. 1991); *Mims v. Mobay Corp.*, No. M-88-157 (S.D. Tex. June 6, 1991); *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283 (W.D. Mo. 1989).

[8] *See, e.g., Perkins v. Northeastern Log Homes, Inc.*, No. C89-0564-L(M) (W.D. Ky. Feb. 26, 1992); *Montana Pole & Treating Plant v. I.F. Laucks and Co.*, 775 F. Supp. 1339 (D. Mont. 1991); *Riden v. ICI Americas, Inc.*, 763 F. Supp. 1500 (W.D. Mo. 1991); *Evenson v. Osmose Wood Preserving, Inc.*, 760 F. Supp. 1345 (S.D. Ind. 1990); *Darrow v. Vacudyne, Inc.*, No. 88-CV-40467-FL, 1990 U.S. Dist. LEXIS 19564 (E.D. Mich. April 30, 1990); *Cannon v. Chapman Chem. Co.*, No. 88-2252 (W.D. Ark. Mar. 5, 1990); *Brooks v. S.C. Johnson & Son, Inc.*, No. 86-4136 (S.D. Ill. Jan. 10, 1990); *Whitener v. Reilly Indus., Inc.*, No. 87-5224 (S.D. Ill. Oct. 25, 1989); *Cox v. Velsicol Chem. Co.*, 704 F. Supp. 85 (E.D. Pa. 1989); *Roberts v. Dow Chem. Co.*, 702 F. Supp. 195 (N.D. Ill. 1988); *Villari v. Terminix Int'l*, 692 F. Supp. 568 (E.D. Pa. 1988); *Wilson v. Chevron Chem. Co.*, No. 85 Civ. 762 (JFK) (S.D. N.Y. May 18, 1986).

[9] *Compare Riden, Evenson, and Darrow, supra* note 8, *with Fisher, Herr, and Fitzgerald, supra* notes 6 & 7 and accompanying text.

[10] *Compare Mims and Young, supra* note 7, *with Riden and Montana Pole, supra* note 8.

[11] Very recently, a three-judge appellate panel in Missouri split on the preemption issue. *See Yowell v. Chevron Chem. Co.*, No. 17605, 1992 Mo. App. LEXIS 1193 (Mo. Ct. App. July 13, 1992). The majority, relying principally on the Tenth Circuit's opinion in

The remarkable split in authority on this preemption issue has percolated through the judicial system long enough; indeed, the Ninth Circuit and the New Jersey Supreme Court have recently found the absence of judicial consensus on the issue to have achieved independent legal significance. *See Chem. Specialties Mfrs. Ass'n, Inc. v. Allenby*, 958 F.2d 941, 948 (9th Cir. 1992) ("The great split in authority is important to illustrate that even when the consequences of state action clearly pressure companies to change their FIFRA labels, there is no consensus on whether the state action is preempted."), *petition for cert. filed*, 60 U.S.L.W. 3844 (U.S. June 4, 1992) (No. 91-1957); *Feldman v. Lederle Lab.*, 592 A.2d 1176,

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the instant case, concluded that state tort claims of inadequate labeling are impliedly preempted by FIFRA. *See* 1992 Mo. App. LEXIS 1193, at *4-14. The dissent, however, concluded that, in light of this Court's decision in *Cipollone*, the Tenth Circuit wrongly decided the preemption issue, and should have found no preemption. *See id.* at *18-19. In California, an intermediate appellate court recently elected to follow *Ferebee* rather then the Eleventh Circuit's *Papas* decision and the Tenth Circuit's opinion in this case, and held that common-law tort claims were not preempted. *See Miranda v. Shell Oil Co.*, No. 188845 (Cal. Ct. App. Apr. 22, 1992). In Florida, an intermediate appellate court last year appeared to find preemption of such tort claims. *See Begley v. Truly Nolan Exterminating, Inc.*, 573 S.2d 1038 (Fla. Dist. Ct. App. 1991). Among the many trial court opinions on this issue, cases finding no preemption include *Chavolla v. Shell Chem.*, No. 548003 (Cal. Super. Ct. May 31, 1990); *Perry v. Dow Chem. Co.*, No. CL 88 10227AN (Fla. Cir. Ct. Palm Beach County June 29, 1989); *Privette v. Armour Exterminating*, No. 85-6279 CA (Fla. Cir. Ct. Palm Beach County Feb. 26, 1988 and Mar. 16, 1988); *Packowski v. Orkin Exterminating Co.*, No. 85-46671-NI (Mich. Cir. Ct. Kent County May 5, 1989). Cases finding preemption include *Southern Colo. Farms, Inc. v. Green*, No. 88 CV 40 (Colo. Dist. Ct. Saguache County June 7, 1991); *Brennan v. Dow Chem Co.*, No. CL-90-8882 AO (Fla. Cir. Ct. Palm Beach County June 3, 1991); *Fullmer v. Arab Termite & Pest Control, Inc.*, No. 29C 018907 CT415 (Ind. Cir. Ct. Hamilton County May 24, 1991); *Abelman v. Velsicol Chem. Corp.*, No. 12611 (Md. Cir. Ct. Montgomery County May 17, 1991); *Davidson v. Velsicol Chem. Corp.*, No. A-246535 (Nev. Dist. Ct. Clark County Apr. 5, 1991).

1190 (N.J. 1991) ("The split among courts addressing the issue suggests that there is not a 'clear and manifest' expression of congressional intent and calls into question the reasoning and authority of *Papas*."), *cert. denied*, 60 U.S.L.W. 3878 (1992). This issue is ripe for resolution by this Court.

III. IN HOLDING THAT THE STATUTORY AND REGULATORY REGIME THAT WAS ESTABLISHED AFTER FIFRA WAS AMENDED IN 1972 NOW OPERATES TO PREEMPT COMMON-LAW TORT CLAIMS THAT ARE BASED ON THE INADEQUACY OF LABELS ON, OR WARNINGS RELATING TO, PESTICIDE PRODUCTS THAT WERE DISTRIBUTED AND SOLD PRIOR TO THE 1972 AMENDMENTS TO FIFRA, THE TENTH CIRCUIT HAS IGNORED CONTRARY CONGRESSIONAL INSTRUCTIONS AND HAS DECIDED A MATTER OF STATUTORY RETROACTIVITY IN A WAY THAT CONFLICTS WITH THE DOMINANT STRAND OF APPLICABLE DECISIONS OF THIS COURT, INCLUDING THE DECISION IN *CIPOLLONE*

As this Court has previously noted, *see, e.g., Wisconsin Public Intervenor v. Mortier*, 501 U.S. ——, 115 L. Ed 2d 532, 540 (1991), the statutory and regulatory regime that currently exists under FIFRA is the result of a comprehensive revision of FIFRA undertaken by Congress in 1972 through the Federal Environmental Pesticide Control Act of 1972, 86 Stat. 973, Pub. L. No. 92-516 (the "1972 Legislation"). Prior to the 1972 Legislation, FIFRA ("pre-1972 FIFRA") was primarily a licensing and labeling statute that (i) required all pesticides sold in interstate commerce to be registered with the Secretary of Agriculture (the "Secretary")[12] and (ii) contained

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[12] In 1970, regulatory authority under FIFRA was transferred from the Department of Agriculture ("USDA") and its Secretary to the newly-formed Environmental Protection Agency ("EPA")

"general standards setting forth the types of information necessary for proper labeling of a registered pesticide . . . ." *Monsanto*, 467 U.S. at 991. Like the current FIFRA, pre-1972 FIFRA had no provisions for private actions or for compensation for injuries caused by pesticides.

The limited role of pre-1972 FIFRA, even in the area of product labeling, is apparent in FIFRA regulations that were published in 1959 and were effective and substantially unchanged throughout the 1960s and early 1970s. For example, the regulations made various suggestions for pesticide labeling statements, but made clear that the exact wording used in the suggested labeling statements was not obligatory; moreover, manufacturers were told to use any added warnings or caution statements that any special characteristics or uses of their formulations indicated were necessary. *See, e.g.*, 24 Fed. Reg. 10,835, 10,855 (1959) (codified at 7 C.F.R. § 362.116 (d)). In the event that a registrant contemplated changes "in substance" in the labeling of a product, the regulations prescribed a procedure for obtaining a new or amended registration incorporating the changed label. *See* 24 Fed. Reg. at 10,848 (codified at 7 C.F.R. § 362.106 (h)). In general, the regulations quite clearly and explicitly set out the very limited role of pre-1972 FIFRA, its registration process, and its labeling standards:

> (1) Registration is a device to bring the economic poison to the attention of the Department of Agriculture and to furnish an opportunity to correct *obvious* faults in labeling. It does not place the responsibility for correct labeling upon the Department though the Department does advise relative to revi-

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and its Administrator. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). FIFRA regulations were transferred to EPA without change, except that the words "Department of Agriculture" in the regulations were deemed to mean "Environmental Protection Agency." *See* 7 C.F.R. Ch. XXVII (1971).

> sion of labeling, on the basis of available information. . . .
>
> (2) Registration is not to be understood as indicating the Department of Agriculture's approval or recommendation of the economic poison.
>
> (3) Federal registration does not remove the requirements for state registration in those states which require registration.

24 Fed. Reg. at 10,847 (codified at 7 C.F.R. §§ 362.106 (d)(1)-(3)) (emphasis added). *See also* 24 Fed. Reg. at 10,849 (codified at 7 C.F.R. § 362.109(d)): "No references to [a guarantee that a product has been registered under FIFRA] may be made on the label or in the labeling of the product since such reference would be likely to give the purchaser an unwarranted sense of security."

As the Tenth Circuit acknowledged below, *see* App. 4a, pre-1972 FIFRA contained no provisions specifically restricting state authority over pesticide labeling, in sharp contrast to the restrictions currently found in 7 U.S.C. § 136v(b).

In light of the very limited role of pre-1972 FIFRA and its lack of any preemptive language regarding state authority over pesticide labeling, any contention that pre-1972 FIFRA might preempt state tort claims based on inadequate warning would seem highly implausible. It appears that those courts that have considered the question have concluded as much. *See In re "Agent Orange" Product Liability Litigation*, 635 F.2d at 995 n.14 (noting that FIFRA was not intended to preempt state law even with respect to those matters it specifically regulates); *Hubbard-Hall Chem. Co. v. Silverman*, 340 F.2d 402, 405 (1st Cir. 1965) (proceeding on the assumption that FIFRA did not occupy the field). *Cf. Griffin v. Planters Chem. Corp.*, 302 F. Supp. 937, 940, 944 (D. S.C. 1969) (manufacturer's duty to warn is over and above USDA's requirements); *Muncy v. Magnolia Chem. Co.*, 437 S.W.2d 15, 17-19 (Tex. Civ. App. 1968) (mere com-

pliance with labeling standards of FIFRA and Texas Insecticide, Fungicide, and Rodenticide Act does not establish freedom from negligence as a matter of law).

In the instant case, it is undisputed that, although AP&G's claims of inadequate warning did not arise under Colorado state law until after the discovery of penta contamination in 1987, those claims are based on acts and omissions that occurred prior to the 1972 Legislation. Moreover, as AP&G pointed out to both courts below, Section 4(e) of the 1972 Legislation provides that, "[f]or purposes of determining any criminal or civil penalty *or liability to any third person* in respect of any *act or omission* occurring before the expiration of the periods referred to in this section [which in no event could be earlier than October 21, 1972, when the 1972 Legislation was enacted], the Federal Insecticide, Fungicide, and Rodenticide Act shall be treated as continuing in effect as if this Act had not been enacted." *See* 1972 U.S.C.C.A.N. at 1170 (emphasis added). On the basis of that express congressional directive that the 1972 Legislation have only prospective application, and on the basis of this Court's holdings regarding the propriety of retroactive application of statutes, AP&G argued in the courts below that the FIFRA preemption issue must, under the facts of this case, be analyzed under the FIFRA statute and regulations as they existed prior to the 1972 Legislation.

Both of the courts below rejected AP&G's contention, and elected to analyze the preemption issue under the current FIFRA regime. The district court, citing this Court's opinion in *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696 (1974), asserted that a court "is bound to apply the law in effect at the time it renders its decision, unless there would result a manifest injustice." App. 18a. The Tenth Circuit, though recognizing that *Bradley*'s presumption in favor of statutory retroactivity appears to be in conflict with this Court's later decision in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), *see* App. 5a n.1, nevertheless agreed with the district court

that pre-1972 FIFRA should not govern the preemption analysis. The Tenth Circuit stated that applying the 1972 Legislation to this case simply does not present any issue of retroactivity, both because AP&G's cause of action "arose" after 1972 and because, even if the cause of action "ripened" prior to 1972, " 'a statute is not rendered retroactive merely because the facts or requisites upon which a subsequent action depends are drawn from a time antecedent to the enactment.' " *See* App. 6a (quoting *Lohf v. Casey*, 466 F.2d 618, 620 (10th Cir. 1972)). The Tenth Circuit's only affirmative basis for applying the current FIFRA statute to this case was its expressed belief that a jury award today, though based on acts or omissions committed prior to the 1972 Legislation, would nevertheless have "an impact on FIFRA as it currently exists," because such an award would cause manufacturers to change their labels. *See id.* In concluding that the current FIFRA statute governs the preemption analysis in this case, neither court below even acknowledged the contrary congressional directive in Section 4(e) of the 1972 Legislation, despite repeated citations to it in the parties' briefs, at oral argument, and in AP&G's petition for rehearing.

The Tenth Circuit's decision to apply the current FIFRA to this case warrants this Court's review. First, even in *Bradley*, where this Court set forth "the principle that a court is to apply the law in effect at the time it renders its decision," *see* 416 U.S. at 711, an exception to that principle is recognized where "there is statutory direction or legislative history to the contrary." *Id.* The Tenth Circuit had no authority to disregard Congress's directive that pre-1972 FIFRA was to apply to liabilities arising out of acts and omissions that occurred prior to the 1972 Legislation, and substitute its own standard, which was based on the date on which a "cause of action" "arises" under state law. *See, e.g., Badaracco v. Comm'r of Internal Revenue*, 464 U.S. 386, 398 (1984) ("Courts are not authorized to rewrite a statute because

they might deem its effects susceptible of improvement."). *See also, e.g., Goldstein v. California*, 412 U.S. 546, 551-52 (1973) (where congressional amendments to federal copyright law in 1971 expressly applied only to sound recordings that were "fixed" on or after February 15, 1972, the amendments could have no preemptive effect on state-law claims regarding recordings that were "fixed" prior to February 15, 1972).

Second, even apart from Congress's express directive to the contrary, the Tenth Circuit's application of current FIFRA law to the respondents' acts and omissions during the 1960s and early 1970s is defensible, if at all, only under an almost conclusive presumption that statutes have retroactive effect. The court's lone affirmative basis for applying the current FIFRA statute—that is, its speculation that a jury award today, based on inadequate pesticide warning labels distributed twenty or more years ago, would cause manufacturers to change their labels tomorrow, thus having "an impact on FIFRA as it currently exists"—is arguable only if manufacturers are not protected by preemption from state-law tort claims under the current FIFRA statute—a proposition that the court itself went on to reject. That asserted rationale for applying the current FIFRA statute obviously adds nothing to a mere presumption of statutory retroactivity. However, the dominant strand of this Court's discussions on statutory retroactivity suggests that such a presumption in this case is not warranted. *See, e.g., Bennett v. New Jersey*, 470 U.S. 632, 638-646 (1985) (absent clear legislative intent to the contrary, substantive provisions of 1978 statutory amendments would not be retroactively applied in determining if funds were misused during 1970-1972; instead, the stricter standards that were in effect at the time of the allegedly wrongful conduct would be applied).

This case provides the Court with an opportunity to sweep away much of the confusion in the lower courts regarding the propriety of applying subsequent statutory

amendments to prior conduct. However, in light of the express congressional directive that pre-1972 FIFRA was to apply to liabilities arising out of acts and omissions that occurred prior to the 1972 Legislation, and in light of this Court's preemption analysis in *Cipollone*, which applied the federal statute in effect at the time of the allegedly tortious acts and omissions of the defendants, *see supra* at note 3 and accompanying text, this Court should consider, at a minimum, summarily vacating or reversing the Tenth Circuit's judgment, and remanding the case with appropriate instructions.

IV. IN HOLDING THAT THE CURRENT FIFRA PREEMPTS STATE COMMON-LAW TORT CLAIMS OF INADEQUATE WARNING OR LABELING, THE TENTH CIRCUIT HAS WRONGLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

In focusing on issues relating to, first, whether the Tenth Circuit's analysis in this case was inconsistent with this Court's analysis in *Cipollone*, and, second, whether the Tenth Circuit's decision to apply current FIFRA rather than pre-1972 FIFRA to the facts of this case was contrary to express congressional intent and this Court's presumptions and practices regarding statutory retroactivity, AP&G does not mean to obscure two important points about the Tenth Circuit's decision that make this a compelling case for this Court's review.

First, the Tenth Circuit has decided a question of great national importance. By broadly holding that the current FIFRA statute preempts state tort actions based on labeling and alleged failure to warn, the Tenth Circuit has found a congressional intent to completely sweep away injured persons' rights under state common law with respect to inadequate—or even nonexistent—pesticide labels and warnings, without providing any alternative relief for such injured persons. Considering the great

potential for harm arising out of improper use, storage, and disposal of pesticides, the importance of such a holding is manifest. *Cf. Mortier*, 115 L.Ed. 2d at 542 (certiorari granted in light of the importance of the issue of whether FIFRA preempts regulation of pesticides by local governments); *Cipollone*, 60 U.S.L.W. at 4705 (certiorari granted in light of "manifest importance" of preemption issue arising out of federal control over cigarette warning labels). Indeed, evidence of the importance of this issue can be found in the number and geographic diversity of cases involving the issue, *see, e.g., supra* at 12-17, and in the level of participation in these cases by *amici curiae*. *See, e.g.*, App. 1a; Petition for Writ of Certiorari at i n.1, *Papas*.

Second, assuming *arguendo* the applicability of current FIFRA rather than pre-1972 FIFRA in this case, the Tenth Circuit has nevertheless reached the wrong result. As noted earlier, *supra* at 9, under *Cipollone*, the Tenth Circuit should have confined its analysis to a consideration of the express preemptive reach of section 136v(b), which restricts states from "impos[ing] or continu[ing] in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." In *Cipollone*, this Court analyzed express preemptive provisions by considering the precise wording of the provisions, the statutory statement of purpose, the regulatory context of the congressional enactments, and general principles of statutory construction that are consistent with the general presumption against preemption. *See* 60 U.S.L.W. at 4707. A similar analysis of section 136v(b) yields the following (necessarily brief) observations.

a.) The language of section 136v, taken as a whole, appears to apply only to state regulation of federally registered pesticides; indeed, subsections (a) and (c) were amended in 1978 to explicitly narrow their scope to federally registered products. *See* Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819, 835. The

Tenth Circuit's broad holding of preemption in the instant case plainly exceeds that scope.

b.) Unlike the statute considered in *Cipollone*, which set forth Congress's purpose of striking a balance between protecting industry interests and adequately informing the public about the hazards of smoking, *see* 60 U.S.L.W. at 4705 n.5 and accompanying text, the language and history of FIFRA reveal no similar congressional purpose behind FIFRA's preemption of state-imposed labeling requirements. Instead, the very heading of section 136v(b) —"Uniformity"—reflects the goal of preventing a multiplicity of conflicting state regulations; indeed, two sections earlier, the statute expressly refers to the goal of "securing uniformity of regulations." *See* 7 U.S.C. § 136t(b). "[T]he term 'regulation' most naturally refers to positive enactments by [legislative and administrative] bodies, not to common law damages actions." *Cipollone*, 60 U.S.L.W. at 4707. Moreover, section 136v(b)'s exclusive concern with uniformity of labeling regulations, rather than preemption of common-law actions, was reinforced when FIFRA was extensively revised in 1988. *See* Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, 102 Stat. 2655. Despite the D.C. Circuit's prior holding in *Ferebee*, and despite the presence and testimony of pesticide industry lobbyists (including representatives of respondent Dow) at the hearings that preceded the 1988 enactment, *see* H.R. Rep. No. 100-939, *reprinted in* 1988 U.S.C.C.A.N. 3474, 3517, the only change made to section 136v(b) was the addition of the heading "Uniformity." "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change," *Lorillard v. Pons*, 434 U.S. 575, 580 (1978), and AP&G is unaware of any evidence that Congress was not comfortable with the D.C. Circuit's interpretation of section 136v(b) when it re-enacted the text of that section without change.

c.) As this Court observed in *Cipollone*, "there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions," including actions based on failure to warn. *See* 60 U.S.L.W. at 4707. Such preemption is consistent with a reading of the statute as having superseded only positive enactments by legislatures or administrative agencies, *see id.*, and the Tenth Circuit's conclusion to the contrary, *see* App. 8a-10a, was error.

d.) Even if preemptive language regarding state-imposed "requirements" *can* restrict common-law obligations, *cf. Cipollone*, 60 U.S.L.W. at 4708 (rejecting petitioner's argument that the phrase "requirement or prohibition" limited a particular provision's preemptive scope to positive enactments by legislatures and agencies), and even if such language *does* preempt some such claims in the instant case, it should be noted that the language of section 136v(b) preempts only state-imposed "requirements for labeling" that are "in addition to or different from" FIFRA's requirements. The section does not, by its terms, preempt state-imposed "liability" that may arise out of a manufacturer's failure to comply with FIFRA's labeling requirements or standards. *Cf. Cipollone*, 60 U.S.L.W. at 4709 n.24 (discussing possible differences in scope between preemption of state-imposed "requirements" and preemption of state-imposed "liability"). Such state-imposed liability would create no additional or different "requirements for labeling," *see Worm*, 1992 U.S. App. LEXIS 14154, at *14-22, nor would such liability trench on section 136v(b)'s express goal of "uniformity" in labeling requirements.

e.) Finally, this Court has counseled that the purpose of Congress is the "ultimate touchstone" of preemption analysis. *See Cipollone*, 60 U.S.L.W. at 4706. In this regard, where the current FIFRA, unlike the statute considered in *Cipollone*, (i) does not purport to strike a

balance between industry interests and public health, (ii) does not mandate particular labels on products, but instead permits each manufacturer to draft and modify its own product labels subject to certain guidelines, *see generally* 40 C.F.R. Part 152,[13] and (iii) applies to thousands of different products, the dangers of which are not widely known, AP&G suggests that it is highly implausible that Congress would choose, through the language of section 136v(b), to express a "clear and manifest" intention to take away all recourse from persons who are injured by inadequate pesticide labels or warnings. *Cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.").

CONCLUSION

The petition for a writ of certiorari should be granted. At a minimum, this Court should grant the petition, summarily vacate or reverse the judgment, and remand the case for further consideration in light of this Court's decision in *Cipollone*.

Respectfully submitted,

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[13] Indeed, EPA itself has acknowledged that pesticide companies often voluntarily add "precautionary" statements to their labels, and do so for "liability reasons." *See* 49 Fed. Reg. at 37,971 (1984).

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-1085

ARKANSAS-PLATTE & GULF PARTNERSHIP,
a Colorado general partnership,
Plaintiff-Appellee,

v.

VAN WATERS & ROGERS, INC., a Washington corporation;
THE DOW CHEMICAL COMPANY, a Delaware corporation,
Defendants-Appellants.

NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION; WESTERN ARGICULTURAL CHEMICALS ASSOCIATION; NATIONAL PEST CONTROL ASSOCIATION; NATIONAL AGRICULTURAL AVIATION ASSOCIATION; CHEMICAL SPECIALTIES; AMERICAN WOOD PRESERVERS INSTITUTE; CHEMICAL MANUFACTURERS ASSOCIATION; PRODUCT LIABILITY ADVISORY COUNCIL, INC.; TRIAL LAWYERS FOR PUBLIC JUSTICE,
Amici Curiae.

Appeal from the United States District Court
for the District of Colorado
D.C. No. 89-S-1726

[Filed Mar. 6, 1992]

Richard R. Young (Brent E. Rychener and Walter H. Sargent, with him on the briefs) of Holme Roberts & Owen, Colorado Springs, Colorado, for Plaintiff-Appellee.

David A. Bailey (Dean R. Massey and Anne D. Weber, with him on the briefs) of Parcel, Mauro, Hultin & Spaanstra, P.C., Denver, Colorado, for Defendant-Appellant, Van Waters & Rogers, Inc.

C. Michael Montgomery (Peter S. Dusbabek, Montgomery, Green, Jarvis, Kolodny & Markusson, Denver, Colorado; and Edward B. Fitzpatrick, III, The Dow Chemical Company, Midland, Michigan, with him on the briefs), of Montgomery, Green, Jarvis, Kolodny & Markusson, Denver, Colorado, for Defendant-Appellant, The Dow Chemical Company.

Lawrence S. Ebner, McKenna & Cuneo, Washington, D.C.; Charles S. Siegel, Baron & Budd, P.C., Dallas, Texas; and Arthur H. Bryant and Priscilla Budeiri, Trial Lawyers for Public Justice, Washington, D.C., on the briefs for Amici Curiae.

Before LOGAN and MOORE, Circuit Judges, and ALLEY, District Judge.*

MOORE, Circuit Judge.

In 1985 plaintiff Arkansas-Platte & Gulf (AP&G) succeeded to ownership of property in Colorado which previously had been occupied by a wooden fence-post treatment facility. That facility used a pentachlorophenol product, "Dowicide 7," from approximately 1960 to 1972. In 1987, an AP&G employee was diagnosed with pentachlorophenol poisoning. AP&G filed suit in 1989 against Van Waters & Rogers and The Dow Chemical Company as pentachlorophenol manufacturers or distributors, as-

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* The Honorable Wayne E. Alley, United States District Court Judge for the Western District of Oklahoma, sitting by designation.

serting Colorado state tort claims of negligence and strict liability based on a failure to warn of the product's environmental hazards. Dow and Van Waters & Rogers moved for summary judgment, asserting the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (FIFRA), preempts state common law tort claims based on labeling. The district court denied summary judgment, holding there was no express or implied preemption by FIFRA of state tort claims based on negligent failure to warn. *Arkansas Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 748 F. Supp. 1474, 1482, 1484 (D. Colo. 1990).

On motion of the defendants, the district court certified this question for interlocutory appeal. We may take interlocutory appeals when there is a substantial question of law and an immediate appeal will materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292 (b). We review motions for summary judgment *de novo*. *City of Chanute, Kan. v. Williams Natural Gas Co.*, —— F.2d ——, 1992 WL 12682, at *2 (10th Cir. 1992). *See also Barnson v. United States*, 816 F.2d 549, 552 (10th Cir.), *cert. denied*, 484 U.S. 896 (1987). If no genuine issue of material fact exists,, we determine if the substantive law was correctly applied. *Applied Genetics Int'l v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990), citing *Osgood v. State Farm Mut. Auto. Ins. Co.*, 848 F.2d 141, 143 (10th Cir. 1988). There is no dispute of fact on the preemption issue before us. The parties disagree about (1) what body of FIFRA law should be applied, and (2) whether state law is preempted. We reverse the denial of summary judgment to the defendants, and hold FIFRA impliedly preempts state tort actions based on labeling and alleged failure to warn.

I. Applicable Law

AP&G argues its claims originate from actions occurring from 1960 to 1972, and thus FIFRA provisions enacted in 1972 cannot affect defendants' pre-exposure

duties. In the alternative, AP&G asserts neither the 1947 Act nor the 1972 amendments preempt state common law failure to warn claims, and the distinction is unimportant. We disagree with both arguments.

While pre-1972 FIFRA law concerning labeling is similar to the legal regime set forth in the 1972 amendments, it is not identical. FIFRA was enacted in 1947 as a licensing and labeling statute replacing the Insecticide Act of 1910. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991, 104 S. Ct. 2862, 2866 (1984). The 1947 Act gave the Agriculture Department authority to regulate, register, and label "economic poisons and devices." *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799, 804 (M.D. Fla. 1989). There was no provision in the 1947 Act, however, specifically restricting state authority over pesticide labels.

In contrast, the 1972 amendments significantly strengthened the Act's registration and labeling standards, constructing a comprehensive regulatory regime. *Wisconsin Pub. Intervenor v. Mortier*, —— U.S. ——, 111 S. Ct. 2476, 2480 (1991), citing *Ruckelshaus*, 467 U.S. at 991, 104 S. Ct. at 2867. The 1972 provisions sought to "regulate the use of pesticides to protect man and his environment," and "extend Federal pesticide regulations to actions *entirely within a single State*." *Kennan*, 717 F. Supp. at 804, citing S. Rep. No. 92-838, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993. Section 136v, addressing the "authority of states" provides:

> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide . . . in the State, but *only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.*
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect *any requirements for labeling or packaging in addi-*

> *tion to or different from* those required under this subchapter.

7 U.S.C. § 136v(a), (b) (emphasis added).

A plain reading of the statute indicates an intent to maintain the traditional police powers of the states in the general grant of authority to "regulate the sale or use" of pesticides, § 136v(a), and a more specific intent to occupy the field in labeling and packaging, § 136v(b). Section 136v(c) further examines the states' prerogatives for registering pesticides for uses to meet special local needs. Clearly if the 1947 Act did not specifically restrict state authority over labeling, the 1972 amendments instruct a different interpretation of the preemption of state law.

Like the district court, we find plaintiff's contention that we should apply pre-1972 FIFRA law unavailing. AP&G relies on *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377 (10th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S. Ct. 799 (1991), arguing the application of current FIFRA law to past events would present a question of retroactivity. *DeVargas* addressed the retroactive application of statutory amendments which became effective during the pendency of that litigation. The court held in the absence of clear congressional intent instructing retroactive application, the law should be applied prospectively. *DeVargas*, 911 F.2d at 1388, 1393.[1]

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[1] *DeVargas* found two lines of Supreme Court precedent, *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 94 S. Ct. 2006 (1974), and *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 109 S. Ct. 468 (1988), were in "irreconcilable conflict" in applying statutes whose intent on retroactivity is unclear. *DeVargas*, 911 F.2d at 1390. *Bradley* held when congressional intent is unclear, " 'a court is to apply the law in effect at the time it renders its decision,' " except where application of the law would result in "manifest injustice." *DeVargas*, 911 F.2d at 1388-389, citing *Bradley*, 416 U.S. at 711, 94 S. Ct. at 2016. *DeVargas* found *Bowen* stated a contrary rule, that "congressional enactments and admin-

If this case presented a question of retrospective application of a statute, we would indeed apply *DeVargas*. The issue here, however, does not concern retroactivity, but rather when plaintiff's cause of action arose. Our examination of the claim leads us to conclude it arose after 1972. AP&G acquired its property in 1985, found the property contaminated in 1987, and filed suit in 1989. Even were we to assume plaintiff's cause of action ripened prior to 1972, we have said it is "fundamental" that "a statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends are drawn from a time antecedent to the enactment." *Lohf v. Casey*, 466 F.2d 618, 620 (10th Cir. 1972), citing *Cox v. Hart*, 260 U.S. 427, 43 S. Ct. 154 (1922). *DeVargas* is therefore not on point.

Furthermore, any jury award on claims arising from a duty to label or warn has an impact on FIFRA as it presently exists. As the court stated in *Kennan v. Dow Chem. Co.*, "[w]hether or not the decedent was exposed prior to 1972 does not negate the fact that a jury award today would constitute regulation by causing manufacturers to change their labels . . . . Congress has expressly preempted such regulation by the states." 717 F. Supp. at 811. We therefore apply FIFRA as amended.

II. Preemption Doctrine

The preemption doctrine is based on the Supremacy Clause of Article Six of the Constitution. U.S. Const. art. VI, cl. 2. The Supremacy Clause invalidates state laws

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istrative rules will not be construed to have retroactive effect unless their language requires this result." *DeVargas*, 911 F.2d at 1389, citing *Bowen*, 109 S. Ct. at 471. "Faced squarely with the issue [of] . . . which presumption—*Bradley* or *Bowen*—is to govern," the *DeVargas* court found *Bowen* was supported by the weight of Supreme Court authority, and held the Civil Rights Restoration Act of 1987 did not apply retroactively. *DeVargas*, 911 F.2d at 1392-93.

that interfere with, or are contrary to" federal law. *Hillsborough County, Fla. v. Automated Medical Labs., Inc.*, 471 U.S. 707, 712, 105 S. Ct. 2371, 2375 (1985), citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (Marshall, C.J.). The burden of proving preemption is on defendants, who must show Congress meant FIFRA to preempt state tort claims based on failure to warn.

Preemption turns on the intent of Congress and on the effect of the conflicting rule. Intent may be express, *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 1309 (1977), or inferred when Congress has chosen to occupy a particular field and "a scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. at 2481, citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947). Even when the field is not occupied, we may still infer preemption to the extent state and federal law conflict. This may be when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S. Ct. 1210, 1217-18 (1963), when federal law implies a barrier to state regulation, *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368, 106 S. Ct. 1890, 1898 (1986), citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S. Ct. 2890 (1983), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404 (1941).

III. Failure to Warn Claims Based on Labeling

Several courts have considered whether FIFRA preempts state tort claims based on labeling and alleged failure to warn with conflicting results. The Eleventh Circuit held state common law tort labeling claims are im-

pliedly preempted by FIFRA, 7 U.S.C. § 136v(b). *Papas v. Upjohn Co.*, 926 F.2d 1019, 1024 (11th Cir. 1991), *petition for cert. filed*, 59 U.S.L.W. 3825 (U.S. May 29, 1991) (No. 90-1837).[2] While FIFRA explictly instructs states can regulate the *sale or use* of federally registered pesticides, § 136v(b) precludes "any requirements for *labeling or packaging* in addition to or different from those required pursuant to this act." *Id.* (emphasis added). The *Papas* court reasoned jury awards of damages in these actions would result in direct conflict with federal law. *Id.* at 1025. We agree.

The Administrator of the EPA is charged under the statute with determining whether the pesticide "when used in accordance with widespread and commonly recognized practice . . . will not generally cause unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(D). The EPA considers these adverse effects in determining what labels comply with FIFRA's requirements. 7 U.S.C. § 136a(c)(5)(B). The labels "'must be adequate to protect the public from fraud and from personal injury and to prevent unreasonable adverse effects on the environment.'" *Papas*, 926 F.2d at 1024, citing 40 C.F.R. § 156.10(i)(1)(i).

State court damage awards based on failure to warn would constitute ad hoc determinations of the adequacy of statutory labeling standards. This would hinder the accomplishment of the full purpose of § 136v(b), which is to ensure uniform labeling standards. *Papas* noted even if a state tort action accomplished the same goal as the federal statutory provisions, federal law would still preempt the state action because "it attempts to achieve that

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[2] *Compare Kennan v. Dow Chem. Co.*, 717 F. Supp. at 807 ("FIFRA expressly preempts state law regulation of pesticide labeling . . . .") ; *and Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404, 406 (E.D. Mich. 1987) ("Congress has expressly stated its intent to preempt **any state labeling or packaging** requirements different from or additional to those mandated by FIFRA," citing § 136v(b)).

purpose by a method which interferes with the federal methods." 926 F.2d at 1026, citing *International Paper Co. v. Ouellette*, 479 U.S. 481, 497, 107 S. Ct. 805, 813 (1987).

We decline to follow the D.C. Circuit's holding in *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062, 105 S. Ct. 545 (1984), as suggested by AP&G. *Ferebee* involved a suit by the estate of an agricultural worker against Chevron alleging Chevron's failure to label paraquat with an adequate warning caused Mr. Ferebee's lung disease and subsequent death. The D.C. Circuit held the tort action was not preempted by FIFRA, basing its holding on the general grant of authority to the states in § 136v(a) to regulate the use of FIFRA-controlled products within state borders. *Ferebee*, 736 F.2d at 1541. We do not agree with the D.C. Circuit that because labeling can be part of the compensatory objectives of the state in regulating use, the general grant of § 136v(a) encompasses authority over labeling.[3] Section 136v(b) clearly narrows the general grant of § 136v(a) to *exclude* "requirements for labeling or packaging."

Ferebee distinguished between the "direct" injunction against the states' imposing labeling requirements and requirements which might be imposed through state common law. *Id.* The court reasoned the EPA's determination that Chevron's label was adequate *"for FIFRA purposes* does not compel a jury to find that the label is also adequate *for purposes of state tort law . . . ."* *Ferebee*, 736 F.2d at 1540 (emphasis in *Ferebee*). *Ferebee* further stated:

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[3] "Given this provision [§ 136v(a)], Maryland might well have the power to ban paraquat entirely . . . . As a result, Maryland is entitled to control the use of paraquat for compensatory aims by holding Chevron liable for injuries that could have been prevented by a more adequate label." *Ferebee*, 736 F.2d at 1541.

> The verdict itself does not command Chevron to alter its label—the verdict merely tells Chevron that, if it chooses to continue selling paraquat in Maryland, it may have to compensate for some of the resulting injuries. That may in some sense impose a burden on the sale of paraquat in Maryland, but it is not equivalent to a direct regulatory command that Chevron change its label . . . .

Ferebee, 736 F.2d at 1541.[4]

We do not accept this "choice of reaction" analysis. A business choice between paying damages and changing the label is only notional. As the First Circuit stated in *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987):

> Once a jury has found a label inadequate under state law, and the manufacturer liable for damages for negligently employing it, it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability. The most obvious change it can take . . . is to change its label.

Id. at 627-28. This choice cannot be consistent with FIFRA's preclusion of "any requirements for labeling or packaging in addition to or different from" the statutory mandate. 7 U.S.C. § 136v(b).

AP&G relies on *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S. Ct. 615 (1984), which stated there was no "irreconcilable conflict between the federal and state standards," and that the "imposition of a state standard in a damages action" would not "frustrate the objectives

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[4] *See also Ferebee*, 736 F.2d at 1542 ("Compliance with both federal and state law cannot be said to be impossible: Chevron can continue to use the EPA-approved label and can at the same time pay damages to successful tort plaintiffs such as Mr. Ferebee; alternatively, Chevron can petition the EPA to allow the label to be made more comprehensive.").

of the federal law." 464 U.S. at 256, 104 S. Ct. at 626. We distinguish *Silkwood* because it construes the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, a statute with substantially different regulatory and safety goals from FIFRA. The Atomic Energy Act contains no pre-emption provision and reserves significant authority to the states. "Further, the enactment and legislative history [of the Act] make clear Congress' explicit judgment that state common law damage actions for injuries caused by nuclear operations should be permitted to continue." *Palmer v. Liggett Group*, 825 F.2d at 628. In contrast, FIFRA does specify restrictions on state authority in labeling, and the legislative history of FIFRA is not clear on the queston of state common law tort actions based on labeling and failure to warn.

Our thinking is bolstered by the Supreme Court's recent decision in *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476 (1991). In *Mortier*, a Wisconsin town granted plaintiff a permit for pesticide spraying with certain use restrictions. Plaintiff claimed the town ordinance was preempted by FIFRA and state statute. The Supreme Court disagreed, holding FIFRA did not preempt political subdivisions from regulating the *use* of pesticides, "either explicitly, implicitly, or by virtue of an actual conflict." *Id.* at 2482. The Court found FIFRA had not occupied the field of pesticide regulation in general or of local use permitting in particular. *Id.* at 2486. According to *Mortier*, the specific grant of authority in § 136v(a) ensures the states can "continue to regulate *use and sales* even where, such as with regard to the banning of *mislabeled products*, a *narrow pre-emptive overlap* might occur." *Id.* (emphasis added).

This "narrow preemptive overlap" is precisely the issue before us. In dicta addressing FIFRA's preemption of labeling claims, the Court stated:

> [F]ield pre-emption cannot be inferred. In the first place, § 136v itself undercuts such an inference. The

> provision immediately following the statute's grant of regulatory authority to the States declares that "[s]uch State shall not impose or continue in effect any requirements for labeling and packaging in addition to or different from those required under" FIFRA. 7 U.S.C. § 136v(b). *This language would be pure surplusage if Congress had intended to occupy the entire field of pesticide regulation.*

Id. at 2486 (emphasis added).[5]

Thus, the Supreme Court reasoned Congress had not occupied the entire field of pesticide regulation, instead leaving intact the states' historic police powers to consider regional and local factors in regulating *use*. The Court indicated, however, Congress had impliedly preempted state regulation in the more narrow area of *labeling*. While the holding of *Mortier* is confined to the regulation of pesticides by local governments, *id.* at 2479, we are nevertheless inclined to adopt its construction of FIFRA.[6]

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[5] *See also* 111 S. Ct. at 2487. "As we have . . . made plain, local use permit regulations—*unlike labeling or certification*—do not fall within an area that FIFRA's 'program' pre-empts or even plainly addresses." (emphasis added).

[6] Several district courts have considered preemption with respect to labeling and failure to warn claims since *Mortier* and followed its dicta. *See, e.g., Young v. American Cyanamid Co.*, Civ. No. B-C-90-89 (E.D. Ark. N.D. Oct. 21, 1991) (unpublished order); *Worm v. American Cyanamid Co.*, Civ. A. No. HAR-90-1424, 1991 WL 144328 (D. Md. July 12, 1991) (unpublished opinion). *Cf. Montana Pole & Treating Plant v. I.F. Laucks*, 775 F. Supp. 1339 (D. Mont. 1991) (adopting *Ferebee* and declining to follow *Papas* in case involving labeling of pentachlorophenol). In our opinion, *Montana Pole* wrongly relies on *Mortier* without considering the Court's distinction between preemption of state regulation of the *sale and use* of pesticides, and state authority over *labeling*. *Montana Pole*, 775 F. Supp. at 1344.

IV. Summary

We therefore hold state tort actions based on labeling and alleged failure to warn are impliedly preempted by FIFRA as a matter of law. This is by virtue of the direct conflict posed with federal uniform regulation of pesticides, and because we believe Congress intended to occupy the field of pesticide labeling regulation. We base our holding on the language of § 136v, our rejection of the *Ferebee* court's "choice of reaction" analysis, and our understanding of the Supreme Court's construction of FIFRA in *Mortier*. We need not reach the district court's holding there is no express FIFRA preemption, and emphasize our holding only concerns the narrow issue of labeling. We do not address other state tort claims by AP&G which may be pending against the defendants.[7]

We therefore REVERSE the decision of the district court denying defendants' summary judgment on plaintiff's state tort claims based on labeling and failure to warn, and REMAND for further proceedings.

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[7] *See, e.g., Kennan*, 717 F. Supp. at 812 (while finding express preemption of failure to warn claims in § 136v(b), court "state[d] no view as to whether . . . defense of unavoidable dangerousness ha[d] been preempted"); *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283, 1289 (W.D. Mo. 1989) (FIFRA preempts common law failure to warn claims, but not claims that herbicide sold in unreasonably dangerous condition).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JUDGE DANIEL B. SPARR

Civil Action No. 89 S 1726

ARKANSAS PLATTE & GULF PARTNERSHIP,
Plaintiff,

v.

VAN WATERS & ROGERS INC., *et al.*,
Defendants.

ORDER

[Filed Oct. 22, 1990]

THIS MATTER comes before the Court on Defendant Dow Chemical's motion for summary judgment, filed January 31, 1990. Oral argument on the motion was heard August 13, 1990.

PROCEDURAL BACKGROUND

Defendant Dow Chemical [1] bases its brief in support of summary judgment on three contentions: (1) the alleged failure to warn on the part of Defendant Dow, if any, did not cause plaintiff's damages as a matter of law; (2) Plaintiff lacks standing to bring an action for the property damages it seeks; and (3) Plaintiff's state law tort claims are preempted by federal law and accordingly are barred.

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[1] Defendant Van Waters & Rogers has joined in the relevant pleadings by Dow Chemical in support of its motion for summary judgment.

At the hearing of Defendant's motion, the first argument was withdrawn, as the Defendant conceded that the causality question was factual in nature. At that time, the Court also denied the second argument, determining that the standing issue concerned assignment which was an issue of fact. Having determined that summary judgment was improper on the Defendant's first two arguments, the Court took under advisement the third argument, concerning application of the preemption doctrine. This order will address exclusively the preemption argument.

Defendant Dow Chemical (hereafter "Dow"), alleges that the statutory scheme of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") found at 7 U.S.C. § 136 et seq., preempts the Plaintiff's cause of action cognizable under state tort law arising from an alleged failure to warn due to the inadequacy of the labeling of the chemical "Dowicide 7." [2]

FACTUAL BACKGROUND

It is undisputed that, during the years 1960-1972, Plaintiff's predecessors operated a wooden fence post treatment facility on their ranch property. The posts were soaked in a pentachlorophenol solution which greatly increased the durability of the posts. The chemical used in the procedure is more commonly referred to as "penta." Defendant's product "Dowicide 7" is a form of penta.

Plaintiff instituted this lawsuit claiming that the penta which was spilled or otherwise came into contact with the property caused the ranch to become a contaminated site. In their complaint, Plaintiff makes a negligent failure to warn claim, alleging that, among other things, the Defendants failed to provide any warning to the owners (of the property) of the potential environmental risks or hazards to the property which might result from such use.

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[2] With regard to the Plaintiff's strict liability claim, the Defendant, relying on the decision of *Kennan v. Dow Chemical*, 717 F.Supp. 799 (M.D. Fla. 1989) makes no claim of preemption.

Plaintiff commenced the suit after it discovered penta contamination after the soil was tested. The soil tests were undertaken after the notification of the Plaintiff by one of its employees, Edward Seger, that he had been diagnosed as having penta poisoning. The Plaintiff's cause of action, however, does not concern Seger's personal injury.

Before this Court undertakes any analysis of the preemption question as it relates to FIFRA, and in particular the negligent failure to warn claim, it must be noted that there are several courts which have already considered this very question, and many more that have dealt with other questions regarding preemption. These cases will be noted and, where appropriate, discussed.

The wealth of case law on this issue is somewhat puzzling. The cases provide almost an even split of authority. There are some threads of consistency in determining some of these preemption questions. This Court will attempt to undertake an analysis which is not necessarily outcome determinative.

THE PLEADINGS

Defendant Dow Chemical filed its motion for summary judgment on January 31, 1990. Dow relies on two arguments in its preemption argument: (1) FIFRA preempts Plaintiff's negligence claim due to its comprehensive regulation of pesticides (focusing on the FIFRA provision found at 7 U.S.C. § 136v(b), entitled "uniformity," under the heading of 136v for "Authority of States." That provision states: "such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this Act."); and (2) Plaintiff's tort claim based on the inadequacy of the label must fail as FIFRA prohibits any state regulation of the area of labeling, and any recovery under state law would, in effect, amount to prohibited regulation. Dow

relies heavily on the preemption analysis of *Kennan*, 717 F.Supp. 799 and *Fitzgerald v. Mallinckrodt*, 681 F.Supp. 404 (E.D. Mich. 1987).

Plaintiff's opposition was filed March 9, 1990. Plaintiff argued that there was no preemption of its negligence claim, relying on *Ferebee v. Chevron Chemical Co.*, 736 F. 2d 1529 (D.C. Cir. 1984) *cert. denied* 469 U.S. 1062 (1984) rejected Dow's arguments that EPA approval of a manufacturer's claim did not compel a jury to find the same, and distinguishing the different, but not competitive, goals of FIFRA and state tort law. Plaintiff maintained that the requirement of EPA approval of label does not prevent state from furthering traditional tort goals. Plaintiff cites to several cases which have adopted the *Ferebee* reasoning, or cited it with approval. (Including several federal as well as state cases.) Plaintiff also argues that since the FIFRA was extensively revised by Congress in 1988, after the *Ferebee* decision, and no effort was made to statutorily overrule the decision, it can be presumed that Congress has adopted that interpretation of FIFRA. Plaintiff criticizes also the *Fitzgerald* case for its reliance on *Palmer v. Liggett Group*, 825 F. 2d 620 (1st Cir. 1987), a case concerning the Cigarette Act. Plaintiff undertakes a rudimentary preemption analysis, and urges the Court to align itself with those decisions finding no preemption.

At oral argument of the motion before this Court on August 13, 1990, the Plaintiff raised an additional argument, to which Dow has responded, which urges the Court to apply pre-1972 law to Plaintiff's claims. This argument was effectively raised at the time of the hearing [3] and Dow filed its supplemental response on August 17, 1990. The Court will not concern itself with any analysis of pre-

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[3] The argument was first raised by Plaintiff in a pleading filed (Friday) August 10, 1990 at 4:55 p.m. The oral argument was held the morning of August 13, 1990.

1972 FIFRA law and the status of Plaintiff's tort claims under such provisions. Plaintiff's arguments are unavailing and would only provide unnecessary confusion to the already muddy waters of preemption doctrine analysis. Because it appears that some of Plaintiff's claims may not have existed under pre-1972 FIFRA analysis, and the fact that the Court is bound to apply the law in effect at the time it renders its decision, unless there would result a manifest injustice, *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974), this order will not consider the pre-1972 FIFRA argument.

PREEMPTION DOCTRINE ANALYSIS

At the outset it must be noted that the Court properly considers a number of factors when undertaking a preemption analysis of statutory language or common law on either the federal or state level. The court must consider the relationship between the state and federal laws as they are interpreted and applied, not merely as they are written. *Jones v. Rath Packing*, 430 U.S. 519, 526 (1977).

The burden of proving preemption is on the movant. Dow must show that Congress intended to preclude state tort damage awards when it promulgated 7 U.S.C. § 136v (b) or as reflected in the FIFRA statute as a whole. The question is more accurately directed not towards whether Congress expressly allowed such damage awards, but rather, since tort damage awards have long been a part of traditional state tort law, to the question of whether Congress expressly supplanted them. Without an express preclusion of such awards, it must be assumed that such tort law principles would apply with full force and effect. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984).[4] Dow must overcome this burden.

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[4] Is should be noted here, however, as the court in *Palmer v. Liggett Group, Inc.*, 825 F.2d at 628, pointed out, the *Silkwood* case involved the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.*, which contained no preemption provision.

1. The Historical Underpinnings of the Preemption Doctrine

The Supremacy Clause of Article XI, clause 2 of the United States Constitution provides: "[t]he Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme law of the land. . . ." U.S. Const., Art. VI, cl. 2. It is a familiar and well-established principle that the Supremacy Clause . . . invalidates state laws that "interfere with, or are contrary to," federal law. *Hillsborough County, Fla. v. Automated Medical Labs*, 471 U.S. 707, 713 (1985), *citing Gibbons v. Ogden*, 9 Wheat. 1 (1824).

The preemption clause may apply to federal common law as well as state statutory or common law. Justice Rehnquist noted this distinction in *Milwaukee v. Illinois*, 451 U.S. 304 (1981):

> [T]he appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law pre-empts state law. In considering the latter question 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' (Quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).)

The Supreme Court has articulated in *Louisiana Public Service Comm'n v. Federal Communications Comm'n*, 476 U.S. 355 (1986) an oft-cited listing of factors for preemption analysis, which has served to be instructive to many courts, but nonetheless offers little help in providing any practical means of analysis or "test" for trial courts:

> The Supremacy Clause of Article VI of the Constitution provides Congress with the power to pre-

empt state law. Premption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), when there is outright or actual conflict between federal and state law, *e.g.*, *Free v. Bland*, 369 U.S. 663 (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). where there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and having no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

See *Palmer v. Liggett Group, Inc.*, 825 F.2d at 624-625.

2. The Various Levels of Preemption Analysis

As evidenced by the listing of factors above in *Louisiana Public Service*, the court may consider any number of factors in its preemption analysis. This seems to be part of the problem and may lie at the source of the widely divergent decisions concerning application of preemption analysis. It is apparent that these factors, which were not intended to be an exhaustive treatment of the matter, must be tailored to the particular statute and regulatory scheme promulgated by Congress with a view to determining how the state law (as distinguished from the federal common law) or regulation may affect the federal provisions. In view of the cases on the subject, it is apparent that the only workable "test" is one which considers the statutory language, the entire statute, and its legislative history if necessary, in light of its relationship to the state common law provisions.

3. The Test

A. Express Preemption

Express preemption arises only in certain limited circumstances. Statutes which expressly supersede state law are not common. To determine whether there is express preemption, the court must consult the statute. *Louisiana Public Service*, 476 U.S. at 368. With regard to a finding that no express preemption exists, it is not necessary for a federal statute to provide explicitly that particular state laws are preempted. *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) citing *Hillsborough County*, 471 U.S. 707.

(1) Examination of Statutory Provisions

Although inquiry into legislative motive is often an unsatisfactory venture, *United States v. O'Brien*, 391 U.S. 367, 383 (1968), it nonetheless may be necessary to the determination of the controversy before the court. All provisions in a statute should be given effect. *See U.S. v. Menasche*, 348 U.S. 528, 538-539 (1990). If express preemption is not found by the language of the statute,[5] then the next level of analysis concerns implied preemption. The difficulties of consistent preemption analysis generally begin with implied preemption, as the several factors of that analysis allow the courts a great amount of discretion to determine whether Congress impliedly preempted state laws or regulations. As the First Circuit noted in *Palmer*, the gist of preemption is whether Congress (expressly) did or (impliedly) meant to displace state law or state law concepts in enacting the federal law. *Palmer*, 825 F. 2d at 625-626.

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[5] One court addressing the FIFRA statute in a preemption context, did find there was express preemption of the plaintiff's claim based on negligent labeling and failure to warn based on the statutory provision of 7 U.S.C. § 136v(b). *Fitzgerald v. Mallinckrodt*, 681 F.Supp. at 407. To this Court's knowledge, the *Fitzgerald* court is the only court to have found such language to expressly preempt such a claim under FIFRA.

B. Implied Preemption

Implied preemption presents questions which are completely different from the more superficial analysis required in express preemption. The broader issue here arises from the very fact that Congress acted. The court must look at the consequences of that action. The Supreme Court noted recently in *English v. General Electric Co.*, 110 S.Ct. 2270, 2279 (1990):

> Ordinarily, the mere existence of a federal regulatory or enforcement scheme . . . does not by itself imply preemption of state remedies. The Court has observed: 'Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law. . . . Instead, we must look for pre-emption.'

(Citing *Hillsborough County*, 471 U.S. at 719.)

On the other hand, it must be noted that "it is not necessary for a federal statute to provide explicitly that particular state laws are preempted." *Ouellette*, 479 U.S. at 491, citing *Hillsborough County*, 471 U.S. at 713.

The more difficult questions begin here: did Congress impliedly preempt the awarding of state tort law damages by a jury when it promulgated 7 U.S.C. § 136v(b)? Some courts have formulated the answer to this question by essentially asking a different question: does the award of damages by a jury amount to state regulation of labeling and packaging which the Congress impliedly preempted in § 136v(b)?

To determine what Congress may have implied, it is necessary to consider the statutory provision in its proper context—the statute as a whole.

Two primary considerations must be noted in the implied preemption context:

(1) the problem of resolving the potential conflict between § 136v(a) and § 136v(b). Several courts have not entertained any alternative to the application of § 136v(b) to a plaintiff's state tort law claims for negligence arising from inadequacy of the label. Other courts have noted the provision of § 136v(a) which specifically allows the states to regulate the use of pesticides by states. This is but one of the conflicts created by the divergence of case authority on this subject.

(2) arising from (1) but also standing alone to a certain extent is the (revisited) question of congressional intent. The purpose of the statute is the "ultimate touchstone" of supremacy clause (preemption doctrine) analysis. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987).

Because the whole notion of implied preemption concerns the interpretation of congressional intent and purpose from the statutory language and history, it is important to keep in mind these basic rules of preemption doctrine analysis and construction:

(1) Congressional Purpose

As noted above, there is a wide divergence of case authority as to the statutory purpose and intent of Congress in promulgating the FIFRA and its regulatory scheme. This divergence applies not only to the particular provisions (*e.g.*, §§ 136v(a) and 136v(b)) and how courts have construed their relationship to the FIFRA as a whole, but also to the overall Congressional purpose in enacting FIFRA. It must be recognized that the relationship between the parts and the whole is a crucial one. Although many courts have deemed the analysis of Congressional intent as distasteful, this Court would be shirking its duties if it dismissed such analysis. The court is left no choice but to examine Congressional intent

where there is no express preemption. If the Court found no express preemption, but failed to make an examination of the statutory purpose, the court would effectively be allowing preemption of state laws or regulations merely because the Congress has taken some sort of action in the area.

Congressional Occupation of the Field

Congressional purpose is a legitimate determination in considering the factors of implied preemption. The question whether the regulation of an entire field has been reserved by the Federal Government is, essentially, a question of ascertaining the intent underlying the federal scheme. *Hillsborough County*, 471 U.S. at 714. Although occupation of the field is an otherwise established factor of preemption analysis, the *Silkwood* court noted in considering a state law punitive damages claim which defendants contend was preempted by the Nuclear Regulatory Act (which as previously noted did not contained a preemption clause) that occupation of the field was not the appropriate test, but rather whether, "there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law." 464 U.S. at 256.

Conflict of State Law with Federal Law

The tests which follow the field preemption factor may be characterized as an extension of that test, but are also distinct. The possible incompatibility of the state with the federal law must be examined.

(1) actual conflict

In addition to express or implied preemption, a state law also is invalid to the extent that it "actually conflicts with a . . . federal statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978). See also, *Pacific Gas*

& Electric Co. v. State Energy Resources Conservation, 461 U.S. 190, 204 (1983).

(2) potential conflict

A relevant question here is whether compliance with both is impossible. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). A conflict which is not otherwise an "actual conflict" will also be found when the state law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." *International Paper Co. v. Ouellette*, 479 U.S. at 492, citing *Hillsborough County*, 471 U.S. at 713.

Incompatibility of State Law with Federal Goals

This is a broad question. It must take into consideration the interests of the state through its tort law, to provide compensation for injuries to its citizens and the federal government, in providing uniform regulation of chemicals used in FIFRA. Whether the court chooses to recognize so or not, the distasteful act of divining congressional intent is of necessity in any substantial preemption analysis, as implied preemption analysis, almost by definition, requires such an undertaking. The balancing of these competing interests has been recognized in the area of intellectual property, where the interest of the federal government, as well as that of the states, is carefully guarded.[6] One particularly relevant question for this stage of analysis is whether Congress intended a balance be struck in the statutory scheme as a whole.

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[6] In *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, Justice O'Connor noted the Court's history of analysis with regard to the field of intellectual property: "[t]hus our past decisions have made clear that state regulation of intellectual property must yield to the extent that it clashes with the valance struck by Congress in our patent laws. . . . Where it is clear how the patent laws strike that balance in a particular circumstance, that is not a judgment the States may second guess. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 152 (1989).

This is particularly apparent when the statutory provisions are considered as a whole, with particular attention paid to the provisions regarding state competence in §§ 136v(a) and (b). The balance between state and federal authority can be distinguished at the level of implied preemption in the aforementioned ways because "we must bear in mind that not every state law that in some remote way may affect the [Congressionally occupied field] . . . can be said to fall within the preempted field. *English v. General Electric Co.*, 110 S.Ct. at 2278.[7]

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[7] In this recent decision, the Supreme Court reviewed the preemption of a plaintiff's claim for intentional infliction of emotional distress by a portion of the Energy Reorganization Act of 1974. The *English* Court considered three questions in particular in examining the preemption issue:

> (1) [C]ongress can define explicitly the extent to which its enactments pre-empt state law. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-98 (1983). Pre-emption fundamentally is a question of congressional intent, see *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988), and when Congress has made its intent known through explicit statutory language, the court's task is an easy one.
>
> (2) [I]n the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal inteerst is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Although this Court has not hesitated to draw an inference of field pre-emption where it is supported by the federal statutory and regulatory schemes, it has emphasized: "[W]here . . . the field which Congress is said to have pre-empted" includes areas that have traditionally been occupied by the States," congressional intent to supersede state laws must be " 'clear and manifest.' " *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) . . .
>
> (3) [S]tate law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply

APPLICATION OF THE ANALYSIS TO THE PRESENT CASE

Presented with this veritable smorgasbord of factors for consideration of this motion, the Court will apply the following test, which is premised on U.S. Supreme Court holdings on appropriate factors, as well as a context for their proper consideration.

With regard to the application of the test, the Court will examine two relevant portions of FIFRA, §§ 136v(a) and 136v(b). Both sections are discussed here based on the common factors applicable to them. While Plaintiff may characterize its claim as arising from the "use" of a pesticide, and consequently to which § 136v(a) would apply, the Defendant would characterize the claim as falling under § 136v(b), based on a damage award serving as an indirect regulation of labeling. Because the Court wishes to rise above any semantic distinction based on the particular terms used in the pleadings and relevant papers in this case, and because it feels compelled to examine statutory sections in their proper context, the application of the test will include both sections.

1. *EXPRESS PREEMPTION: Is there specific statutory language evidencing congressional intent to preempt state law?*

The relevant portion of FIFRA is found at 7 U.S.C. § 136v., entitled "Authority of States."

Analysis of § 136v(a), entitled "In general." This section provides: "A State may regulate the sale or use of

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with both state and federal requirements, see, e.g., *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). See also *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981).

English v. General Electric, 110 S. Ct. at 2275.

any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this Act." This section is clearly an affirmative grant of authority to the states to regulate.

Analysis of § 136v(b), entitled "Uniformity." This section provides: "Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this Act." Here it is apparent that, by reading this section both in its statutory context, as well as in light of the state law here concerned, there can be no express preemption. The statutory language is not so explicit as to warrant a finding of express preemption where both of the other subsections of § 136v describe affirmatively the state regulation of pesticides, and where the particular admonition to the states does not describe in any meaningful way which action or type of action is prohibited. There certainly is no mention of preemption of state tort claims in § 136v (b).

Accordingly, there is no express preemption found under either of the FIFRA sections under scrutiny here.

2. IMPLIED PREEMPTION

A. OCCUPATION OF THE FIELD: Does state law regulate conduct in a field that Congress intended the Federal Government to occupy exclusively?

The state law under scrutiny here is neither a statute nor a regulation of pesticides (or their labels). Rather, it is the Colorado common law tort of negligence. With this in mind, the Court will consider the federal government's action in the field, namely FIFRA.

FIFRA, at 7 U.S.C. § 136 *et seq.*, provides a means for protecting health, the environment and regulating standards. The regulatory scheme under FIFRA applies to

some 40,000 chemicals or mixtures of chemicals used as pesticides. The Act classifies the pesticides and provides a framework for their registration with the Administrator (of the Environmental Protection Agency). The vast majority of statutory provisions concern the manufacture and sale, and penalties for improper use of pesticides. Registration of a pesticide is done by its manufacturer. If there is more than one manufacturer of a pesticide, there is no standard mandating that the Administrator insure uniformity in that only one (standard) label may issue.[8]

Occupation of the field may be inferred from a pervasive scheme of federal regulation. The scheme of federal regulation under FIFRA does not easily lend itself to a characterization as "pervasive" except as relates to the registration of pesticides, and even in that area there exists much flexibility (albeit under the authority of the EPA Administration).

With regard to § 136v(a), the affirmative grant of authority to states to regulate the sale and use of pesticides remains intact. No occupation of the field is evident here.

With regard to § 136v(b), a certain caveat must be noted: where the field which Congress is said to have preempted includes areas that have been traditionally occupied by the States, congressional intent to supersede must be clear and manifest.[9] Due to the nature of the state law concerned, it remains unclear that the congressional intent under § 136v(b), as well as that supported by the statutory scheme as a whole, was intended to displace the otherwise available state tort remedy.

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[8] See *Palmer v. Liggett Group* for distinctions drawn between the scheme of federal regulation between FIFRA and the Cigarette Act. 825 F.2d at 628-629.

[9] *See English v. General Electric Co.*, 110 S. Ct. at 2275, citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Having determined that field preemption is not indicative of any congressional intent to preempt the Plaintiff's state tort claim, the Court now turns to the two remaining factors of implied preemption.

B. ACTUAL CONFLICT: Is it impossible for a private party (i.e., Dow) to comply with both state and federal requirements?

The state law requirement for the tort of negligent failure to warn would dictate that the manufacturer (or perhaps seller or distributor) exercise the requisite duty of care (assuming such duty is found to exist) to warn of any dangerous properties which could cause harm to Plaintiff or his property through the use of pesticides.

The federal law requirements in this regard mandate simply that the manufacturer register the pesticide, and prescribes the manner in which this is done. The FIFRA does not mandate such registration procedure for any stated purpose other than regulating pesticides and their use for the protection of humans and the environment. With such broadly stated goals in mind, the FIFRA provides a framework for regulating standards within the pesticide industry. The dearth of specific provision as to how such goals might be carried out is indicative of FIFRA's nature as setting forth minimum standards. These minimum standards stand in sharp contrast to other congressional regulatory schemes.[10]

For these reasons, there exists no actual conflict between the state law requirements and federal law requirements in FIFRA under either § 136v(a) or § 136v(b). There is no reason why a private party, situated as Dow is, could not comply with both sets of requirements.

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[10] Other regulatory schemes which indicate much more thorough involvement by the federal government include: intellectual property, *see Bonito Boats*, 489 U.S. at 152; labor relations, *see English*, 110 S. Ct. at 2279, n.8; and the Cigarette Act, *see Palmer*, 825 F.2d at 628.

C. POTENTIAL CONFLICT: Is the state law incompatible with federal goals? OR Did Congress leave no room for supplementary state regulation?

With regard to this question and its consideration after the actual conflict issue, it may appear academic to examine this question. However, the Court will undertake consideration of this question as it is possible that although no actual conflict exists, due to the nature of the relationship between the two sets of "regulation," a conflict could arise.

It goes without saying that the Court could not consider the question of whether a conflict will arise, as no such issue is presented, and if it were, it certainly would not be ripe for consideration at this time.

Once again, the Court must note the distinction between the two statutory sections under consideration here. Because the grant of authority contained in § 136v(a) for regulating the use of pesticides allows the states broad authority to regulate in that area, no potential conflict could arise here.

With regard to § 136v(b), however, the test at this point is critical as it hinges on interpretation—both of congressional intent and the type of state regulation which it prohibits. It must be noted again here, that the court is required to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written. *Jones v. Rath Packing Co.*, 430 U.S. at 526. With the federal statute and its relevant regulations under consideration, the Court notes that the basic purpose of the statute is to regulate the labelling of such products to provide purchasers with assurance of effectiveness and safety when used in compliance with the manufacturer's instructions. *Roberts v. Dow Chemical Co.*, 702 F. Supp. 195, 196 (N.D. Ill. 1988) citing *Continental Chemiste Corp. v. Ruckelshaus*, 461 F. 2d 331, 335 (7th Cir. 1972).

In light of the meaning of § 136v(b) in context of the overall statutory purpose of FIFRA, the Court will now consider the consequences which the state law may have on this federal scheme of regulation. The state tort claim here at issue is an interest which may be characterized as "peculiarly local" in concern, due to its nature as a common law claim for negligence.[11] Any potential conflict which might arise from a jury award of damages cannot be characterized as a conflict with the statutory regulation scheme of FIFRA due to its failure to address any aspect of state tort recovery in either its statutory language or its regulations. It cannot be assumed that because it failed to specifically mention this possibility, it is nonetheless foreclosed. FIFRA's relatively flexible nature of regulating pesticides and their distribution forecloses such a conclusion.[12]

This Court accordingly finds that there is no potential conflict between the state tort claim and the FIFRA provision of § 136v(b).

In conclusion, the Court finds that there is no potential preemption of Plaintiff's state tort law claim for damages based on negligent failure to warn.

It is therefore ORDERED, Defendant Dow Chemical Company's motion for summary judgment is DENIED.

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[11] This "peculiarly local" classification is of concern here also with regard to whether Congress intended to displace the state tort claim for damages. *See National Agricultural Chemicals Association v. Rominger*, 500 F. Supp. 465, 470 (E.D. Cal. 1980), citing *Florida Lime*, 373 U.S. at 146.

[12] One court has characterized this relationship in a somewhat similar manner with regard to implied preemption analysis: [t]he fact that EPA has determined that Chevron's label is adequate *for purposes of FIFRA* does not compel a jury to find that the label is also adequate *for purposes of state tort law* as well." (Emphasis in original.) *Ferebee v. Chevron Chemical Co.*, 736 F.2d at 1540.

DATED at Denver, Colorado, this 22nd day of October, 1990.

BY THE COURT:

/s/ Daniel B. Sparr
DANIEL B. SPARR
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JUDGE DANIEL B. SPARR

Civil Action No. 89 S 1726

ARKANSAS-PLATTE & GULF PARTNERSHIP,
a Colorado general partnership,
Plaintiff,

v.

VAN WATERS & ROGERS, INC., a Washington corporation;
THE DOW CHEMICAL COMPANY, a Delaware corporation;
and XYZ COMPANIES,
Defendants.

ORDER

[Filed Jan. 22, 1991]

THIS MATTER comes before the Court on Defendant The Dow Chemical Company's motion for reconsideration of the Court's order entered October 22, 1990. The Defendant seeks this Court's reconsideration or amendment of its Order denying the Defendants' motion for summary judgment. As its basis for reconsideration or amendment, Dow Chemical Company asserts that the Court improperly considered its motion for summary judgment as limited only to preemption of Plaintiff's negligent failure to warn claim. Dow Chemical asserts that its motion was directed at *any* failure to warn claim, regardless of legal theory.

At this time the Court merely wishes to note that it appears the Defendant Dow Chemical Company is essentially seeking reargument of its motion. At the hearing on this motion, Defendant Dow Chemical relied primarily

on the decision in *Kennan v. Dow Chemical Co.*, 717 F. Supp. 799 (M.D. Fla. 1989) for its argument that FIFRA (Federal Insecticide, Fungicide and Rodenticide Act) preempts state law failure to warn claims (transcr. at 7). Both the *Kennan* court, as well as the argument forwarded by the Defendant Dow Chemical Company, rely for support on the earlier decision of *Fitzgerald v. Mallinckrodt, Inc.*, 681 F.Supp. 404 (E.D. Mich. 1987): "FIFRA's preemption of state law claims based on theories of negligent labeling and failure to warn was recognized in *Fitzgerald . . .*" *Kennan*, 717 F.Supp. at 805. Of particular note is the court's ruling in *Kennan*, which states: "To the extent that plaintiff's claims are based on the defective and unreasonably dangerous condition of defendants' products due to defendants' failure to warn, plaintiff's claims are preempted as a matter of law. To the extent that plaintiff's claims are otherwise based on the defectiveness or unreasonable dangerousness of defendants' product on theories of defective design or manufacturing flaw, the motion for summary judgment is denied." *Id.* at 812.

Accordingly, the Defendant Dow Chemical Company's motion to reconsider is DENIED.

The Court hereby certifies its order of October 22, 1990 denying summary judgment for appeal pursuant to 28 U.S.C. 1292(b). Further proceedings in this matter shall not otherwise be stayed by this Court unless a party requests a stay of the proceedings within 10 days of this Order.

DATED at Denver, Colorado, this 22 day of January, 1991

BY THE COURT:

/s/ Daniel B. Sparr
DANIEL B. SPARR
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-527

THE DOW CHEMICAL COMPANY;
VAN WATERS & ROGERS, INC.,
Petitioners,

v.

ARKANSAS-PLATTE & GULF PARTNERSHIP,
Respondent.

ORDER

Filed February 26, 1991

Before LOGAN and EBEL, Circuit Judges.

This matter comes on for consideration of the petition of The Dow Chemical Company and Van Waters & Rogers, Inc. for permission to appeal under 28 U.S.C. Section 1292(b).

Upon consideration whereof, the petition for leave to appeal is granted.

The date of this order shall serve as the date of the notice of appeal for calculating filing times under the Federal Rules of Appellate Procedure and the Tenth Circuit Rules. Briefing shall follow 10th Cir. R. 31.1.

Entered for the Court

ROBERT L. HOECKER
Clerk

By: /s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-1085

(D.C. No. 89-S-1726)

ARKANSAS-PLATTE & GULF PARTNERSHIP,
a Colorado general partnership,
Plaintiff-Appellee,

v.

VAN WATERS & ROGERS, INC., a Washington corporation;
THE DOW CHEMICAL COMPANY, a Delaware corporation,
Defendants-Appellants.

ORDER

Entered April 16, 1992

Before McKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges, and ALLEY*, District Judge.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc.

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* The Honorable Wayne E. Alley, United States District Judge for the Western District of Oklahoma, sitting by designation.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

SUPREME COURT OF THE UNITED STATES

No. A-7

ARKANSAS-PLATTE & GULF PARTNERSHIP,
Petitioner

v.

DOW CHEMICAL COMPANY, *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including July 31, 1992.

/s/ Byron R. White
Associate Justice of the Supreme
Court of the United States

Dated this 1st day of July, 1992.

FILED
SEP 15 1992
OFFICE OF THE CLERK

(2)

No. 92-203

IN THE

Supreme Court of the United States

October Term, 1992

ARKANSAS-PLATTE & GULF PARTNERSHIP,
Petitioner,

v.

THE DOW CHEMICAL COMPANY and
VAN WATERS & ROGERS INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit correctly determined that the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136 to 136y (1988 & Supp. II 1990), particularly in light of its corresponding regulations, 40 C.F.R. Subchapter E (1991), pre-empts state law tort claims when such claims are based upon an alleged failure to warn.

2. Whether the Tenth Circuit correctly determined, as a matter of Colorado law, that Petitioner's claims arose in the late 1980s, such that the codification of FIFRA existing at that time should be applied to the facts of this case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
STATUTE AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	8
I. THE TENTH CIRCUIT'S APPLICATION OF AN IMPLIED PRE-EMPTION ANALYSIS TO 7 U.S.C. § 136v(b) IS ENTIRELY CONSISTENT WITH *OUELLETTE, MORTIER, CIPOLLONE, GADE,* AND NUMEROUS OTHER LONG-STANDING PRE-EMPTION DECISIONS OF THIS COURT. *CIPOLLONE* DID NOT ABOLISH THE TRADITIONAL IMPLIED PRE-EMPTION ANALYSIS APPLIED BY THE TENTH CIRCUIT BELOW	8
II. THERE IS NO DIVISIVE CONFLICT BETWEEN THE COURTS OF APPEALS OR INCONSISTENCY WITH RECENT SUPREME COURT DECISIONS THAT WARRANTS CERTIORARI REVIEW OF FIFRA PRE-EMPTION OF STATE LAW FAILURE TO WARN CLAIMS	13
A. UNITED STATES COURTS OF APPEALS HAVE BEEN UNANIMOUS IN REJECTING *FEREBEE,* AND FINDING THAT FIFRA PRE-EMPTS STATE LAW FAILURE TO WARN CLAIMS, FOLLOWING THE SUPREME COURT'S REJECTION IN *OUELLETTE* OF *FEREBEE'S* ANALYSIS	13

Page

B. THIS COURT'S INTERPRETATION OF 7 U.S.C. § 136v IN *MORTIER* STRONGLY SUPPORTS A FINDING THAT FAILURE TO WARN CLAIMS ARE PRE-EMPTED 17

C. THE *CIPOLLONE* DECISION DOES NOT ALTER OR AFFECT THE COURTS OF APPEALS DECISIONS, INCLUDING THE TENTH CIRCUIT'S DECISION, THAT HAVE FOUND FIFRA PRE-EMPTS FAILURE TO WARN CLAIMS FOR TWO REASONS: THE PRE-EMPTION LANGUAGE OF FIFRA IS MUCH MORE SIMILAR TO THE 1969 CIGARETTE ACT THAN THE 1965 CIGARETTE ACT AND *CIPOLLONE* MUST BE INTERPRETED IN LIGHT OF THIS COURT'S OPINIONS IN *GADE, OUELLETTE* AND *MORTIER* 20

III. THE TENTH CIRCUIT'S APPLICATION OF 7 U.S.C. § 136v(b) TO THE FACTS OF THIS CASE DOES NOT RAISE AN ISSUE AS TO RETROACTIVE STATUTORY APPLICATION, IS CONSISTENT WITH ESTABLISHED SUPREME COURT PRECEDENT, AND, AS A MATTER OF STATE LAW INTERPRETATION, HAS NO NATIONAL SIGNIFICANCE 22

A. THE TENTH CIRCUIT CORRECTLY DETERMINED THAT THE VERSION OF FIFRA TO BE APPLIED WAS AN ISSUE OF STATE LAW INTERPRETATION AND THAT RETROACTIVITY WAS NOT AN ISSUE IN THIS CASE 23

B. THE TENTH CIRCUIT'S APPLICATION OF 7 U.S.C. § 136v(b) TO THE FACTS OF THIS CASE IS CORRECT AND IN ACCORDANCE WITH ESTABLISHED SUPREME COURT AUTHORITY 25

Page

C. CONTRARY TO PETITIONER'S ASSERTION, THERE IS NO SPLIT OF AUTHORITY ON WHETHER 7 U.S.C. § 136v(b) SHOULD APPLY 25

D. PETITIONER HAS MISINTERPRETED AND MISAPPLIED § 4(e) OF THE 1972 LEGISLATIVE DIRECTIVE 26

CONCLUSION 28

APPENDIX

Letter of August 26, 1992 from the Clerk of the Supreme Court of the United States, Extending the Time for Filing a Brief in Opposition A-1

40 C.F.R. Part 156—Labeling Requirements for Pesticides and Devices B-1

TABLE OF AUTHORITIES

FEDERAL CASES

	Page
In re "Agent Orange" Product Liab. Litig., 635 F.2d 987 (2d Cir. 1980), *cert. denied sub nom. Chapman v. Dow Chem. Co.*, 454 U.S. 1128 (1981)	24
Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers Inc., 959 F.2d 158 (10th Cir. 1992)	1, 4, 5, 6, 7, 8, 15, 19, 23, 24, 25, 26, 27
Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers Inc., 748 F. Supp. 1474 (D. Colo. 1990)	1, 4, 24
Bradley v. Richmond School Bd., 416 U.S. 696 (1974)	25
Burke v. Dow Chem. Co., No. 90-3344, 1992 U.S. Dist. LEXIS 10575 (E.D.N.Y. July 16, 1992)	17
Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992)	6, 7, 9, 10, 11, 12, 13, 20, 21, 22, 23, 28
Cipollone v. Liggett Group, Inc., 893 F.2d 541 (3d Cir. 1990)	20
Cox v. Hart, 260 U.S. 427 (1922)	8, 25
English v. General Electric Co., 496 U.S. 72 (1990)	11, 18
Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)	20
Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984)	7, 14, 15, 16, 17
Fisher v. Chevron Chem. Co., 716 F. Supp. 1283 (W.D. Mo. 1989)	16

	Page
Fitzgerald v. Mallinckrodt, Inc., 681 F. Supp. 404 (E.D. Mich. 1987)	14
Gade v. National Solid Wastes Management Ass'n, 112 S. Ct. 2374 (1992)	6, 7, 10, 11, 12, 13, 28
Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988)	18
Griffin v. Planters Chem. Corp., 302 F. Supp. 937 (D.S.C. 1969)	24
Hubbard-Hall Chem. Co. v. Silverman, 340 F.2d 402 (1st Cir. 1965)	24
Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478 (1990)	10
International Paper Co. v. Ouellette, 479 U.S. 481 (1987)	5, 7, 8, 14, 15, 17, 22, 28
Jones v. Rath Packing Co., 430 U.S. 519 (1977)	10
Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827 (1990)	27
Kennan v. Dow Chem. Co., 717 F. Supp. 799 (M.D. Fla. 1989)	25, 26
Lohf v. Casey, 466 F.2d 618 (10th Cir. 1972)	25
Malone v. White Motor Corp., 435 U.S. 497 (1978)	12
National By-Products, Inc. v. Pope, Nos. 86-207 and 86-397 (E.D. Ky. 1991), *aff'd*, 1992 U.S. App. LEXIS 6752 (6th Cir. April 6, 1992)	15, 16
Northwest Central Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493 (1989)	10

	Page
Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987)	14, 18
Papas v. Upjohn Co., 926 F.2d 1019 (11th Cir. 1991), *cert. granted, vacated and remanded sub nom. Papas v. Zoecon Corp.*, 112 S. Ct. 3020 (1992)	7, 15, 23
Reynolds v. United States, 292 U.S. 443 (1934)	8
Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)	13, 19, 24
Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984)	18
Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476 (1991)	6, 7, 9, 12, 18, 19, 20, 22, 28
Worm v. American Cyanamid Co., No. 91-1749, 1992 U.S. App. LEXIS 14154 (4th Cir. June 19, 1992)	16, 17

STATE CASES

Davidson v. Velsicol Chem. Corp., No. 22464, 1992 Nev. LEXIS 123 (Nev. August 12, 1992)	22
Hiigel v. General Motors Corp., 190 Colo. 57, 544 P.2d 983 (1975)	23
Little v. Dow Chem. Co., 559 N.Y.S.2d 788 (N.Y. Sup. Ct. 1990)	17
Muncy v. Magnolia Chem. Co., 437 S.W.2d 15 (Texas App. 1968)	24
Warner v. American Fluoride Corp., No. 10142/83 (N.Y. Sup. Ct. June 19, 1992)	17
Yowell v. Chevron Chem. Co., No. 17605, 1992 Mo. App. LEXIS 1193 (Mo. Ct. App. July 13, 1992)	22

Page

FEDERAL STATUTES

Atomic Energy Act, 42 U.S.C. § 2011 *et seq.* (1988 and Supp. II 1990) 18

Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. 89-92, 79 Stat. 282 ..... 11, 12, 20, 21, 22

Federal Environmental Pesticide Control Act of 1972, Pub. L. 92-516, 86 Stat. 973 ..... 8, 24, 26, 27

Federal Insecticide, Fungicide and Rodenticide Act, 61 Stat. 163 (1947) 2, 12, 24

Occupational Health Act of 1970, 84 Stat. 1590 10

Public Health Cigarette Smoking Act of 1969, Pub. L. 91-222, 84 Stat. 87 ..... 9, 11, 12, 20, 21

UNITED STATES CODE

7 U.S.C. §§ 136-136y ..... i, 2

7 U.S.C. § 136b 24

7 U.S.C. § 136c 24

7 U.S.C. § 136l 26

7 U.S.C. § 136m 26, 27

7 U.S.C. § 136v 6, 9, 18,

7 U.S.C. § 136v(a) 15, 18

7 U.S.C. § 136v(b) 5, 6, 8, 9, 11, 12, 15, 16, 18, 21, 22, 24, 25, 26, 28

7 U.S.C. § 136w(a)(1) 12

7 U.S.C. § 137(b) [sic] 26

15 U.S.C. §§ 1331-1340 11

Page

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1292(b) 4

29 U.S.C. § 651 *et seq.* 10

FEDERAL REGULATIONS

7 C.F.R. Part 362 (1959) 13

40 C.F.R. Subchapter E (1991) i

40 C.F.R. § 152.112(f) (1991) 13

40 C.F.R. Part 156 (1991) 3

40 C.F..R. § 156.10 (1991) 13

LEGISLATIVE HISTORY

S. Rep. No. 92-838, 92d Cong., 2d Sess. (1972) *reprinted in* 1972 U.S.C.C.A.N. 3993, 4060 26

OTHER AUTHORITY

Rules of the Supreme Court of the United States, Rule 10.1(a) 17

No. 92-203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ARKANSAS-PLATTE & GULF PARTNERSHIP,
Petitioner,

v.

THE DOW CHEMICAL COMPANY and
VAN WATERS & ROGERS INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF

Respondents The Dow Chemical Company and Van Waters & Rogers Inc. respectfully request that this Court deny Arkansas-Platte & Gulf Partnership's petition for writ of certiorari ("Petition"), and not disturb the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado, *see* Petition at 14a, is reported at 748 F. Supp. 1474 (D. Colo. 1990). The opinion of the United States Court of Appeals for the Tenth Circuit, *see* Petition at 1a, is reported at 959 F.2d 158 (10th Cir. 1992).

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on March 6, 1992. *See* Petition at 1a. A timely motion for rehearing was denied on April 16, 1992. *See* Petition at 37a. On July 1, 1992, Justice White signed an order extending the time for Petitioner to file a petition to and including July 31, 1992. *See* Petition at 39a. By letter dated August 26, 1992 the Clerk of this Court extended the time for Respondents to file a brief in opposition to and including September 15, 1992. *See* App. at A-1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y (1988 & Supp. II 1990), provides in pertinent part as follows:

§ 136v. *Authority of States*

(a) *In general*

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) *Uniformity*

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

* * * *

§ 136(p) *Label and labeling.*

(1) *Label.*—The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

(2) *Labeling*.—The term "labeling" means all labels and all other written, printed, or graphic matter—

(a) accompanying the pesticide or device at any time; or

(b) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency, the United States Department of Agriculture and Interior, the Department of Health and Human Services, State experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.

* * * *

The Environmental Protection Agency has promulgated Labeling Requirements for Pesticides and Devices at 40 C.F.R. Part 156 (1991). These regulations are set forth in full in the attached Appendix. *See* App. at B-1.

STATEMENT OF THE CASE

This is a product liability action involving the pesticide pentachlorophenol ("penta"), which is regulated by FIFRA. Petitioner, Arkansas-Platte & Gulf Partnership ("Petitioner"), filed its Complaint against The Dow Chemical Company ("Dow")[1] and Van Waters & Rogers Inc. ("VW&R")[2] (hereinafter collectively referred to as "Respondents"), alleged manufacturers and/or distributors of the subject penta, on or about September 1, 1989.

The Complaint alleges that certain property, presently owned by Petitioner, became contaminated by penta utilized in a wood treatment operation conducted by Petitioner's predecessor from

[1]The parent companies and subsidiaries (except wholly owned subsidiaries) of The Dow Chemical Company are as follows: Marion Merril Dow, Inc., Gruppo Lepetit S.p.A., and Destec Energy, Inc.

[2]Van Waters & Rogers Inc. has no wholly owned subsidiaries. Univar Corporation is the parent company of Van Waters & Rogers Inc.

1960-72. Petitioner, however, did not own the subject property until June 20, 1985, and asserts that its claim arose, at the earliest, on September 1, 1987. The Complaint contains claims premised upon state law theories of negligence and strict liability, both of which are based wholly on an alleged failure to warn regarding the consequences of using penta.

Respondent Dow moved for summary judgment, and was joined by Respondent VW&R, on grounds that FIFRA pre-empted the state law failure to warn claims asserted by Petitioner. The United States District Court for the District of Colorado denied Respondents' Motion by Order dated October 22, 1990. *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers Inc.*, 748 F. Supp. 1474 (D. Colo. 1990). By subsequent Order of January 22, 1991, that court amended its ruling to certify the issue for appeal pursuant to 28 U.S.C. § 1292(b) (1988). *See* Petition at 34a.

Respondents then petitioned the United States Court of Appeals for the Tenth Circuit for leave to appeal the trial court's denial of summary judgment. The Tenth Circuit granted Respondents' petition to appeal on February 26, 1991. *See* Petition at 36a. After briefing and oral argument, the Tenth Circuit issued its opinion of March 6, 1992, reversing the district court's denial of summary judgment to Respondents, and holding that the state law failure to warn claims asserted by Petitioner were impliedly pre-empted by FIFRA. *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers Inc.*, 959 F.2d 158 (10th Cir. 1992) (hereinafter "*Arkansas-Platte*").

Petitioner subsequently submitted to the Tenth Circuit a petition for rehearing and suggestion for a rehearing *en banc*, which petition and suggestion were denied on April 16, 1992. *See* Petition at 37a. After securing an extension from this Court, Petitioner filed the instant Petition for writ of certiorari on July 30, 1992. *See* Petition at 39a.

SUMMARY OF ARGUMENT

This case involves *only* state law tort claims based on an alleged failure to warn, and the Tenth Circuit's holding is so limited. *See*

Arkansas-Platte, 959 F.2d at 164. The proceedings below and the Petition herein do not address, and do not affect, any other state law claims which might be asserted by Petitioner.[3]

FIFRA is federal legislation designed, *inter alia*, to provide a comprehensive and strictly controlled packaging and labeling scheme for pesticides. FIFRA's statutory and regulatory framework, as well as its legislative history, demonstrate clear congressional intent that regulation and control over the *labeling* of pesticides be vested solely with the United States Environmental Protection Agency ("EPA").

Petitioner's state law claims, based on an alleged failure to provide penta warnings differing from the warnings approved and required by the EPA under FIFRA, impermissibly conflict with EPA's determination of what labeling should be required and permitted to implement the federal policies and purposes of FIFRA. A determination of inadequate warning by a jury would constitute impermissible state law regulation of pesticide labeling. In *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), this Court recognized that state law may be impliedly pre-empted if it interferes with the methods by which a federal statute is intended to achieve its goal. 479 U.S. at 494. The Tenth Circuit's decision expressly followed *Ouellette*'s reasoning to find that inconsistent state requirements, including state common-law standards, should be impliedly pre-empted because they would interfere with the EPA's pesticide labeling regulations:

> State court damage awards based on failure to warn would constitute ad hoc determinations of the adequacy of statutory labeling standards. This would hinder the accomplishment of the full purpose of § 136v(b), which is to ensure uniform labeling standards.

[3]During the pendency of Respondents' Motion for Summary Judgment, Petitioner filed a "Motion for Clarification" which requested the trial court to acknowledge that Petitioner had pled claims in addition to failure to warn claims. By Order dated December 13, 1990, the trial court denied Petitioner's "Motion for Clarification," thereby leaving failure to warn as the sole basis for Petitioner's state law claims of negligence and strict liability. Thereafter, Petitioner filed a Motion to Amend its Complaint to allege claims in addition to failure to warn. This Motion is still pending before the trial court.

959 F.2d at 162. Such state regulation of pesticide labeling is pre-empted by FIFRA. Accordingly, the Tenth Circuit was correct in holding that Petitioner's state law failure to warn claims are impliedly pre-empted by FIFRA.

In *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991), this Court applied an implied pre-emption analysis to 7 U.S.C. § 136v, holding that state police powers to regulate pesticide *use* were not pre-empted by FIFRA, but further indicating in dicta that Congress, by enacting 7 U.S.C. § 136v(b), intended to occupy the more narrow area of pesticide labeling. *Mortier*, 111 S. Ct. at 2487.

Petitioner claims that the Court's recent decision in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), created a new analytical framework for pre-emption cases which bars any manner of implied pre-emption analysis if the subject statute contains pre-emptive-type language. Petitioner is incorrect. To the contrary, *Cipollone* was based upon an express pre-emption analysis, did not tacitly overrule decades of prior pre-emption decisions by this Court, and did not create a new framework for implied pre-emption analyses. In particular, *Cipollone* did not hold that the presence of *any* pre-emptive language within a statute forecloses *all* implied pre-emption analysis. This Court's contemporaneous decision in *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374 (1992), confirms that courts should focus on determining the intent of Congress rather than adhering to artificially narrow categories of either express or implied pre-emption.

Congress' enactment of 7 U.S.C. § 136v(b) within FIFRA clearly evinces its intent that the states not impose "any requirements" differing from labeling requirements established by the EPA under FIFRA. The presence of pre-emptive language in § 136v(b) did not require the Tenth Circuit to use only an express pre-emption analysis. The Tenth Circuit properly determined that § 136v(b) and the regulatory framework of FIFRA impliedly pre-empted state law failure to warn claims.

A review of *Ouellette, Mortier, Cipollone,* and *Gade* leads inexorably to the conclusion that state law requirements regarding the labeling of FIFRA-regulated pesticides, including failure to warn tort claims, are pre-empted by FIFRA. Accordingly, there is no special or important reason why this Court should review the FIFRA pre-emption issue addressed by the Tenth Circuit.

Similarly, there is no divisive conflict between the United States Courts of Appeals or inconsistency with recent decisions of this Court that warrants review of the FIFRA pre-emption issue. Following this Court's 1987 decision in *Ouellette*, the four United States Courts of Appeals that have considered this issue, including the Tenth Circuit's decision in *Arkansas-Platte*, have been unanimous both in finding that FIFRA pre-empts state law failure to warn claims and in rejecting the "choice of reaction" analysis set forth in *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984). Additionally, this Court's decision in *Mortier* recognized in persuasive dicta that Congress intended to pre-empt state law with respect to the labeling and packaging of pesticides. 111 S. Ct. at 2486.

Ferebee now stands as the lone United States Court of Appeals decision to have determined that FIFRA does not pre-empt state law failure to warn tort claims. Moreover, *Ouellette's* rejection of *Ferebee's* "choice of reaction" analysis constructively overruled, or at least substantially undermined, *Ferebee*.[4]

[4]Petitioner appears to misread this Court's recent action in vacating and remanding the Eleventh Circuit's decision in *Papas v. Upjohn Co.*, 926 F.2d 1019, 1021-26 (11th Cir. 1991), *cert. granted, vacated and remanded sub nom. Papas v. Zoecon Corp.*, 112 S. Ct. 3020 (1992), as in some manner reaffirming *Ferebee* and thus rekindling a split of authority within the United States Courts of Appeals. *See* Petition at 13-14. To the contrary, this Court's action in remanding *Papas* for a consistency review, in light of its 1992 decisions concerning pre-emption, does not suggest that a conflict exists between the United States Courts of Appeals which warrants review. Respondents note further that, unlike the Petition and Brief in Opposition before this Court in *Papas* (which predated the *Gade* and *Cipollone* decisions), Petitioner and Respondents have fully briefed the issue of the consistency of the Tenth Circuit's opinion in *Arkansas-Platte* with this Court's most recent pronouncements.

Additionally, there is no special or important reason why this Court should review the Tenth Circuit's application of the 1972 amendments to FIFRA to the facts at issue in this case. There is no dispute that the Petitioner's claims, as a matter of Colorado law, arose long after the effective date of the 1972 FIFRA amendments, Federal Environmental Pesticide Control Act of 1972, Pub. L. 92-516, 86 Stat. 973. Therefore, the Tenth Circuit's application of FIFRA as amended is in accordance with long-standing decisions of this Court and does not raise an issue of retroactivity. *See, e.g., Reynolds v. United States*, 292 U.S. 443 (1934); *Cox v. Hart*, 260 U.S. 427 (1922). Petitioner's assertion that § 4(e) of the 1972 FIFRA legislation constitutes Congress' express directive prohibiting application of the 1972 legislation to the facts of this case is a misstatement of law which was properly rejected by the Tenth Circuit. Section 4(e) of the 1972 legislation deals solely with effective dates of new provisions introduced by that legislation. Again, no issue is presented for review by this Court.

ARGUMENT

I. THE TENTH CIRCUIT'S APPLICATION OF AN IMPLIED PRE-EMPTION ANALYSIS TO 7 U.S.C. § 136v(b) IS ENTIRELY CONSISTENT WITH *OUELLETTE, MORTIER, CIPOLLONE, GADE,* AND NUMEROUS OTHER LONG-STANDING PRE-EMPTION DECISIONS OF THIS COURT. *CIPOLLONE* DID NOT ABOLISH THE TRADITIONAL IMPLIED PRE-EMPTION ANALYSIS APPLIED BY THE TENTH CIRCUIT BELOW.

This Court's decision in *International Paper Co. v. Ouellette,* 479 U.S. 481 (1987), recognized that a state law is "pre-empted if it interferes with the *methods* by which a federal statute was intended to reach that goal." 479 U.S. at 494 (emphasis added). Thus, the traditional implied pre-emption analysis applies to FIFRA because inconsistent state requirements, such as jury verdicts, interfere with the EPA's pesticide labeling regulations set forth at 40 C.F.R. Part 156 (1991). *See* App. at B-1. The Tenth Circuit correctly relied upon this Court's opinion in *Ouellette. Arkansas-Platte,* 959 F.2d at 162.

Indeed, this Court already has applied an implied pre-emption analysis to 7 U.S.C. § 136v in *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991). In addition to the express pre-emptive language of § 136v, the Court looked to other language within FIFRA and the legislative history of FIFRA to determine its pre-emptive scope on the issue of local regulation of the use of pesticides. 111 S. Ct. at 2483-84. While finding no pre-emption as to local regulation of the *use* of pesticides, the Court confirmed in dicta that FIFRA's regulatory program as a whole, in addition to the language of § 136v(b), pre-empts the field of pesticide labeling: "local use permit regulations—*unlike labeling* or certification—do not fall within an area that FIFRA's *'program'* pre-empts . . . ." 111 S. Ct. at 2487 (emphasis added).

Petitioner, nevertheless, contends that the opinion of this Court in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), casts aside the traditional analysis used by federal courts for at least the past fifty years and creates a new "analytical framework" for evaluation of implied pre-emption cases. *See* Petition at 8. *Cipollone* does no such thing; the Tenth Circuit's decision is consistent with *Cipollone* and the other established authority of this Court in pre-emption cases.

In *Cipollone*, this Court considered the pre-emptive effect of two federal statutes related to cigarette labeling and advertising. The Court made abundantly clear at the outset that it considered the case to be one of express pre-emption.

> In our opinion, the pre-emptive scope of the 1965 Act and the 1969 Act is governed *entirely* by the express language of § 5 of each Act.

112 S. Ct. at 2618 (emphasis added). The Court went on to state:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority, . . . there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation.

Id. (citations omitted). Petitioner seizes on this statement to assert that, if a federal statute contains any pre-emptive-type language, a court is completely barred from so much as considering the implied pre-emptive scope of the federal law. *See* Petition at 9 (incorrectly asserting that the Tenth Circuit's opinion below "does not survive *Cipollone's* directive to give express pre-emptive provisions both exclusive and narrow effect"). Petitioner simply is wrong.

In *Cipollone*, this Court did not abolish the traditional implied pre-emption analysis applied by the Tenth Circuit and other federal courts, nor did it hold that express pre-emption provisions must always be read narrowly. *Cipollone* must be interpreted against the backdrop of this Court's well-established pre-emption doctrine which recognizes that implied pre-emption may exist even when a statute contains a pre-emption provision. If *Cipollone* is read otherwise—as precluding a court from undertaking an implied pre-emption analysis when analyzing a statute containing a pre-emption provision—it effectively and *sub silentio* overrules a number of significant decisions of this Court. *See, e.g.*, *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 484-85 (1990); *Northwest Central Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 509-22 (1989); *Jones v. Rath Packing Co.*, 430 U.S. 519, 540-43 (1977).

That this Court did not intend *Cipollone* to destroy the validity of the traditional implied pre-emption analysis is demonstrated by *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374 (June 18, 1992). *Gade* predated *Cipollone* by only a few days. *Gade* addressed whether the Occupational Safety and Health Act of 1970 (the "OSH Act"), 84 Stat. 1590 (codified at 29 U.S.C. § 651 *et seq.*), a statute supplemented by numerous complex regulations,[5] pre-empted a state regulation which required training for persons working with hazardous materials. Five justices found that the OSH Act pre-empted such a state requirement. Although Justice Kennedy reached this conclusion on the basis of express

[5]The OSH Act is, in this regard, much more similar to the statutory and regulatory scheme under FIFRA than are the cigarette acts at issue in *Cipollone*.

pre-emption, Justice O'Connor's plurality opinion relied on an implied pre-emption analysis. The plurality opinion emphasized that express and implied pre-emption analyses are not mutually exclusive; the presence of an express pre-emption clause did not foreclose an implied pre-emption analysis:

> Justice Kennedy, while agreeing on the pre-emptive scope of the OSH Act, finds that its pre-emption is express rather than implied. The Court's previous observation that our pre-emption categories are not "rigidly distinct," *English v. General Electric Co.*, 496 U.S. 72, 79 n.5 (1990), is proved true by this case. *We, too, are persuaded that the text of the [OSH] Act provides the strongest indication that Congress intended the promulgation of a federal safety and health standard to pre-empt all nonapproved state regulation of the same issue, but we cannot say that it rises to the level of express pre-emption.*

112 S. Ct. at 2386 n.2 (citations omitted in part, emphasis added). The *Gade* plurality thus reaffirmed that a court may look to the pre-emptive language of a statute as part of an implied pre-emption analysis. This analytical framework is identical to that applied by the Tenth Circuit below. Therefore, contrary to Petitioner's argument, the presence of pre-emptive language in 7 U.S.C. § 136v(b) did not restrict the Tenth Circuit to an express pre-emption analysis.[6]

Gade instructs that a court should focus its pre-emption analysis on determining the intent of Congress rather than adhering to

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[6]Moreover, Petitioner's assertion that *Cipollone* directs that pre-emption provisions must be given a "narrow effect" is clearly erroneous. *See* Petition at 9. To the contrary, this Court in *Cipollone* looked to the specific wording of the particular pre-emptive provision to determine whether Congress intended that provision to be read narrowly or broadly. *See* 112 S. Ct. at 2618. The *Cipollone* opinion contrasted the pre-emptive wording of § 5 of the Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. 89-92, 79 Stat. 282 (codified as amended at 15 U.S.C. §§ 1331-1340), in which "Congress spoke precisely and narrowly," with the broader provision in § 5 of the Public Health Cigarette Smoking Act of 1969, Pub. L. 91-222, 84 Stat. 87: "Compared to its predecessor in the 1965 Act, the plain language of the pre-emption provision in the 1969 Act is much broader." 112 S. Ct. at 2519.

artificially narrow categories of either express or implied pre-emption:

> Our disagreement with Justice Kennedy as to whether the OSH Act's pre-emptive effect is labelled "express" or "implied" is less important than our agreement that the implications of the text of the statute evince a *congressional intent to pre-empt* nonapproved state regulations when a federal standard is in effect.

112 S. Ct. at 2386 n.2 (emphasis added). *See also Cipollone*, 112 S. Ct. at 2617 ("The purpose of Congress is the ultimate touchstone of pre-emption analysis.") (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)); *Mortier*, 111 S. Ct. at 2481 (stating that "[t]he ways in which federal law may pre-empt state law are well established and in the first instance turn on congressional intent."). The presence of pre-emptive language in 7 U.S.C. § 136v(b) clearly evinces Congress' pre-emptive intent.

Finally, the pre-emption analysis set forth in *Cipollone* is based upon certain peculiarities of the federal cigarette acts, and should be limited to express pre-emption cases concerning relatively non-complex statutes. Certainly, the statutes addressed in *Cipollone* differ significantly from the much more complex statutory and regulatory scheme of FIFRA. For example, in the federal cigarette acts, Congress set forth a federal smoking and health policy in the statute, but did not authorize any federal agency to implement that policy through regulations. 112 S. Ct. at 2618 (stating that "[i]n this case, the other provisions of the 1965 and 1969 Acts offer no cause to look beyond § 5 of each Act."). In contrast, FIFRA delegates substantial authority to the EPA to set specific standards for the pesticide program through regulations and an enforcement mechanism.[7] 7 U.S.C. § 136w(a)(1).

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[7]FIFRA, as first enacted in 1947, authorized the Secretary of Agriculture to issue rules and regulations to carry out its provisions. *See*

(footnote continued on next page)

Petitioner argues that *Cipollone* dramatically alters the traditional implied pre-emption analysis applied on a consistent basis by federal courts for many years. This argument, however, is without foundation even within the confines of *Cipollone* and is clearly disproved by Justice O'Connor's opinion in *Gade*. The Tenth Circuit below properly applied the doctrine of implied pre-emption by FIFRA to the facts of this case and reached the correct conclusion. Petitioner has failed to demonstrate a viable basis upon which this Court should review the Tenth Circuit's decision; the Petition, accordingly, should be denied.

II. THERE IS NO DIVISIVE CONFLICT BETWEEN THE COURTS OF APPEALS OR INCONSISTENCY WITH RECENT SUPEME COURT DECISIONS THAT WARRANTS CERTIORARI REVIEW OF FIFRA PRE-EMPTION OF STATE LAW FAILURE TO WARN CLAIMS.

A. UNITED STATES COURTS OF APPEALS HAVE BEEN UNANIMOUS IN REJECTING *FEREBEE*, AND FINDING THAT FIFRA PRE-EMPTS STATE LAW FAILURE TO WARN CLAIMS, FOLLOWING THE SUPREME COURT'S REJECTION IN *OUELLETTE* OF *FEREBEE'S* ANALYSIS.

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§ 6(a) of the 1947 FIFRA. In 1959, the Secretary of Agriculture published regulations for the enforcement of FIFRA which included requirements and standards for pesticide labels. 24 Fed. Reg. 10,873-66 (1959) (codified at 7 C.F.R. Part 362). In December 1970, regulatory authority was transferred from the Department of Agriculture to the newly created EPA. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). Under the current regulatory scheme, a manufacturer must comply with detailed and extensive EPA Labeling Requirements for Pesticides and Devices, 40 C.F.R. § 156.10 (1991), to obtain EPA's approval of the label. *See* App. at B-1. EPA will approve registration of a pesticide only after it determines that the label and packaging comply with all applicable requirements of the statute and its regulations. 40 C.F.R. § 152.112(f)(1991).

In 1984, *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984) was the first United States Court of Appeals decision to address the issue of whether FIFRA pre-empts state tort claims premised on failure to warn theories. After eight years, *Ferebee's* holding of no pre-emption, based on its now infamous "choice of reaction" analysis, stands in isolation to four other Courts of Appeals, including the Tenth Circuit's decision below, and numerous district courts that have found FIFRA pre-emption on this same issue. Under *Ferebee's* "choice of reaction" analysis, a defendant which receives a tort verdict may opt not to modify or alter its label, but rather choose to comply with differing federal regulatory and state tort law requirements by "continuing to use the EPA-approved label and by simultaneously paying damages to successful tort plaintiffs." 736 F.2d at 1541-42.

This Court rejected *Ferebee's* "choice of reaction" analysis in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), a case which considered whether the Clean Water Act's prohibition of state regulation of out-of-state "sources of discharge" pre-empts a nuisance action based on state law: "It would be extraordinary for Congress, after devising an elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure." 479 U.S. at 497.[9] Thus, this Court already has recognized the fundamental fallacy of *Ferebee's* "choice of reaction" analysis: "States could do indirectly what they could not do directly." *Id.* at 495.

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[9]Petitioner's assertion, *see* Petition at 25, that the 1988 amendments to FIFRA somehow codified or otherwise reinforced the 1984 *Ferebee* ruling is without merit in light of this Court's 1987 rejection of *Ferebee's* "choice of reaction" analysis in *Ouellette*. Moreover, by 1988, *Ferebee* and its analysis had been harshly criticized by a number of courts. *See, e.g., Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 627-28 (1st Cir. 1987) (describing *Ferebee's* "choice of reaction" analysis as "akin to the free choice of coming up for air after being underwater"); *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404, 407 (E.D. Mich. 1987) (*Ferebee* "arrogates to a single jury the regulatory power explicitly denied to all fifty states' legislative bodies").

None of the succeeding United States Courts of Appeals that have addressed FIFRA pre-emption of state law failure to warn claims have followed *Ferebee* or otherwise affirmed its "choice of reaction" analysis. Instead, they have followed *Ouellette* in clearly and explicitly rejecting both *Ferebee's* "choice of reaction" analysis and its holding of no pre-emption. As the Tenth Circuit explained:

> We decline to follow the D.C. Circuit's holding in *Ferebee* . . . Section 136v(b) clearly narrows the general grant [to states] of § 136v(a) to *exclude* "requirements for labeling or packaging." . . . We do not accept this "choice of reaction" analysis. A business choice between paying damages and changing the label is only notional.

Arkansas-Platte, 959 F.2d at 162 (emphasis in original). Similarly, the Eleventh Circuit rejected *Ferebee* and followed *Ouellette's* directive:

> It might be possible for a manufacturer to comply with both federal regulations and the requirements of state common law as dictated by state law damages awards against pesticide manufacturers, *see Ferebee*, 736 F.2d at 1541-42, but the pressure of such awards would interfere with the EPA's regulatory process because manufacturers would likely press the EPA to change its labeling requirements to reflect the jury awards so as to free the manufacturer from future tort liability for the same jury-found "inadequacies" in labeling.

Papas v. Upjohn Co., 926 F.2d 1019, 1026 (11th Cir. 1991), *cert. granted, vacated and remanded sub nom. Papas v. Zoecon Corp.*, 112 S. Ct. 3020 (1992).

Contemporaneous with the Tenth Circuit's decision in the instant case, the Sixth Circuit independently reached the same conclusion when it affirmed a district court's rejection of *Ferebee* and found that FIFRA pre-empts state law claims based upon allegations of failure to warn. *See National By-Products, Inc. v. Pope*, Nos. 86-207 and 86-397 (E.D. Ky. 1991) (stating that "any claims

respecting Shell's label or the adequacy of warnings on the aldrin product are preempted by FIFRA" and quoting the *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283 (W.D. Mo. 1989), statement that "*Ferebee* seems to be justifying weakly a result"), *aff'd*, 1992 U.S. App. LEXIS 6752 (6th Cir. April 6, 1992) (not recommended for full-text publication).

Finally, the Fourth Circuit in *Worm v. American Cyanamid Co.*, No. 91-1749, 1992 U.S. App. LEXIS 14154 (4th Cir. June 19, 1992), rejected *Ferebee* as well and held that 7 U.S.C. § 136v(b) pre-empts any common-law duty that would impose a labeling requirement inconsistent with those established by FIFRA.

> We find the distinction [between payment of damages and a required label alteration] illusory. If federal law mandates a specific label and permits nothing additional or different, it can hardly be urged that a state tort duty based on a warning requirement that is more elaborate and different does not conflict. The manufacturer in that case cannot comply with both. Implicit in the Worms' argument is a notion that common law tort duties are not regulatory. But surely a jury verdict resulting from a pesticide manufacturer's failure to warn of the dangers of the product has an effect no different from a legislatively enacted state regulation requiring the insertion of a specific warning on the pesticide label.

Id. at *16.

Respondents note that certain district court cases have adopted a "choice of reaction" analysis. However, the vast majority of these lower court cases predate the now overwhelming line of authority, including the Tenth, Fourth, Sixth, and Eleventh Circuits, which has rejected *Ferebee* and has instead held that FIFRA pre-empts state law failure to warn claims.

The few district court cases that have continued to apply a *Ferebee*-type analysis generally are predominated by two common characteristics: a strong desire that there continue to be

remedies available to injured plaintiffs, and a desire to preserve other products liability claims, which, although mistakenly denominated as failure to warn claims, are claims of a type not at issue in the instant case.[10] Respondents' motion for summary judgment only concerns those state law claims based upon an alleged failure to warn. The Tenth Circuit's opinion does not address other common-law remedies.

The significance of federal district court decisions is dubious in any event. This Court's jurisdiction generally is predicated on conflicts between or among the courts of appeals, not the district courts. Sup. Ct. R. 10.1(a). No conflict exists among the circuits since this Court's rejection of *Ferebee's* analysis in *Ouellette.* Therefore, certiorari would be, at best, premature.

B. THIS COURT'S INTERPRETATION OF 7 U.S.C. § 136v IN *MORTIER* STRONGLY SUPPORTS A FINDING THAT FAILURE TO WARN CLAIMS ARE PRE-EMPTED.

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[10]For example, in *Burke v. Dow Chem. Co.,* No. 90-3344, 1992 U.S. Dist. LEXIS 10575 (E.D.N.Y. July 16, 1992), the district court recognized that the pesticide manufacturer defendants "are entitled to some preemption protection" and found persuasive the Tenth Circuit's reasoning that a "business choice between paying damages and changing the label is notional." 1992 U.S. Dist. LEXIS 10575 at *35-37. However, *Burke* did not adopt the Tenth Circuit's holding and rejection of *Ferebee* because it did not want to "foreclos[e] recovery to an injured party." *Id.* at *36. The *Burke* court also was troubled by several New York state court decisions that had found that FIFRA completely pre-empted *all* state law tort actions, not just those based on failure to warn. *Id.* (citing *Little v. Dow Chem. Co.,* 559 N.Y.S.2d 788 (N.Y. Sup. Ct. 1990) and *Warner v. American Fluoride Corp.,* No. 10142/83 (N.Y. Sup. Ct. June 19, 1992)). Similarly, although the Fourth Circuit rejected *Ferebee* in *Worm,* it also expressed concern that labeling requirements subject to FIFRA pre-emption not include causes of action based on breaches of "state-imposed standard[s] of care relating to product design, manufacture, testing, and the like." *Worm,* 1992 U.S. App. LEXIS 14154 at *18. The concerns expressed by *Burke* and *Worm*—that an injured party might be left without remedies—do not apply to this case. As referenced earlier in this Brief, the Tenth Circuit held only that claims based upon failure to warn are pre-empted by FIFRA.

The 1991 decision of *Wisconsin Public Intervenor v. Mortier,* 111 S. Ct. 2476 (1991), remains the only decision issued by this Court to have considered and addressed the pre-emptive scope of FIFRA.[11] In *Mortier,* this Court reviewed the issue of whether a town ordinance that placed restrictions on the use of pesticides was pre-empted by FIFRA, 7 U.S.C. § 136v(a). In holding that local regulation of pesticide use is not pre-empted by FIFRA, this Court analyzed whether Congress intended to pre-empt the entire field of pesticide regulation by comparing the congressional grant of authority to states for the regulation of pesticide *use,* 7 U.S.C. § 136v(a), with Congress' withholding of state authority to regulate pesticide *labeling* and packaging, 7 U.S.C. § 136v(b):

> [F]ield pre-emption [over state regulation of pesticide use] cannot be inferred. In the first place, § 136v itself undercuts such an inference. The provision immediately following the statute's grant of regulatory authority to the States declares

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[11]Petitioner's reliance on the *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174 (1988), *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238 (1984), and *English v. General Elec. Co.,* 496 U.S. 72 (1990), decisions to bolster its assertion of no pre-emption is misleading because these decisions address the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.* (1988 and Supp. II 1990), an act that is significantly different from FIFRA. The First Circuit Court of Appeals noted the uniqueness of the Atomic Energy Act in *Palmer v. Liggett Group, Inc.,* 825 F.2d 620 (1st Cir. 1987), and noted that *Silkwood* in particular was not controlling authority on the pre-emption issue because:

> [The] Atomic Energy Act of 1954, 42 U.S.C. § 2011, *et seq.,* at issue in *Silkwood,* contains no preemption provision whatever. Moreover, . . . the Act also expressly reserves significant authority to the states . . . . Further, the enactment and legislative history of the Atomic Energy Act, as amended . . . make clear Congress' explicit judgment that state common law damage actions for injuries caused by nuclear operations should be permitted to continue . . . *Silkwood* thus took for granted the answer to the [preemption] issue that is the central controversy here. It therefore sheds no light at all on the fundamental question in this case—whether state common law damage actions based on alleged failure to provide adequate warnings are permissible in the first instance.

825 F.2d at 628.

> that "[s]uch State shall not impose or continue in effect any requirements for labeling and packaging in addition to or different from those required under" FIFRA. 7 U.S.C. § 136v(b). This language would be pure surplusage if Congress had intended to occupy the entire field of pesticide regulation. Taking such pre-emption as the premise, § 136v(a) would thus grant States the authority to regulate the "sale or use" of pesticides, while § 136v(b) would superfluously add that States did not have the authority to regulate "labeling and packaging," an addition that would have been doubly superfluous given FIFRA's historic focus on labeling to begin with.

Mortier, 111 S. Ct. at 2486 (citing *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 991 (1984)). Thus, this Court reasoned in *Mortier* that Congress did not intend to occupy the entire field of pesticide regulation precisely because Congress *did* intend to pre-empt state regulation with respect to the labeling and packaging of pesticides. Otherwise, Congress would not have enacted the pre-emptive language contained in 7 U.S.C. § 136v(b).

The Tenth Circuit below followed *Mortier* and concluded:

> Thus, the Supreme Court reasoned Congress had not occupied the entire field of pesticide regulation, instead leaving intact the states' historic police powers to consider regional and local factors in regulating *use.* The Court indicated, however, Congress had impliedly pre-empted state regulation in the more narrow area of labeling. While the holding of *Mortier* is confined to the regulation of pesticides by local governments, *id.,* 111 S. Ct. at 2479, we are nevertheless inclined to adopt its construction of FIFRA.

Arkansas-Platte, 959 F.2d at 163 (emphasis in original, footnote omitted). Respondents are not aware of any federal appellate court decision subsequent to *Mortier* that is to the contrary. Accordingly, there is no reason to revisit the instant FIFRA issue because *Mortier* makes clear this Court's position on the issue of FIFRA pre-emption of pesticide labeling.

C. THE *CIPOLLONE* DECISION DOES NOT ALTER OR AFFECT THE COURTS OF APPEALS DECISIONS, INCLUDING THE TENTH CIRCUIT'S DECISION, THAT HAVE FOUND FIFRA PRE-EMPTS FAILURE TO WARN CLAIMS FOR TWO REASONS: THE PRE-EMPTION LANGUAGE OF FIFRA IS MUCH MORE SIMILAR TO THE 1969 CIGARETTE ACT THAN THE 1965 CIGARETTE ACT AND *CIPOLLONE* MUST BE INTERPRETED IN LIGHT OF THIS COURT'S OPINIONS IN *GADE*, *OUELLETTE* AND *MORTIER*.

In *Cipollone,* 112 S. Ct. 2608 (1992), this Court determined the pre-emptive effect of the Federal Cigarette Labeling and Advertising Act of 1965 ("1965 Act"), Pub. L. 89-92, 78 Stat. 282, and the Public Health Cigarette Smoking Act of 1969 ("1969 Act"), Pub. L. 91-222, 84 Stat. 87. The Third Circuit Court of Appeals had held that the petitioner's state law claims, including failure to warn claims, were pre-empted by both the 1965 and 1969 Acts. *Cipollone v. Liggett Group, Inc.,* 893 F.2d 541 (3d Cir. 1990).

This Court found pre-emption of failure to warn claims based only upon the 1969 Act, which reads as follows:

> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

112 S. Ct. at 2617. By barring "requirement[s] or prohibitions . . . imposed under state law," rather than just "statements," the Court reasoned that the pre-emptive language of the 1969 Act is much broader than that of the 1965 Act. *Cipollone,* 112 S. Ct. at 2619. Further, the Court noted that the phrase "no requirement or prohibition" encompasses common-law rules, and reiterated that the phrase "state law" includes common law as well as statutes and regulations. *Cipollone,* 112 S. Ct. at 2620, *citing Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938). Concluding that Congress' pre-emption of state law "requirements" with respect

to cigarette labels barred the petitioner's state law failure to warn claims, this Court stated:

> Petitioner's claims are pre-empted to the extent that they rely on a state law "requirement or prohibition . . . with respect to . . . advertising or promotion." Thus, insofar as claims under either failure to warn theory require a showing that respondents' post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, those claims are pre-empted.

Cipollone, 112 S. Ct. at 2621-22.

The pre-emptive language of FIFRA at 7 U.S.C. § 136v(b) is substantially similar to § 5 of the 1969 Cigarette Act. Both provisions pre-empt state law "requirements." The 1969 Cigarette Act pre-empts state law requirements with respect to advertising and promotion; FIFRA pre-empts state law requirements in the similar arena of labeling and packaging. Considering the similarity of the pre-emptive language of § 5 of the 1969 Cigarette Act and § 136v(b) of FIFRA, and this Court's holding in *Cipollone* that such language pre-empts state law failure to warn claims, this Court's *Cipollone* decision validates the four United States Courts of Appeals decisions which have interpreted 7 U.S.C. § 136v(b) as pre-empting state law failure to warn claims.[12]

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[12]This Court reversed the Third Circuit's decision as it applied to the 1965 Act. 112 S. Ct. at 2619. Congress had enacted the following pre-emptive language at § 5 of the 1965 Act:

> (b) No statement related to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Focusing, in significant part, on use of the term "statement," the Court concluded that Congress "spoke precisely and narrowly" regarding the pre-emptive language of § 5 of the 1965 Act. Considering the divergent regulatory activities undertaken by state legislatures and federal agencies preceding the 1965 Act, this Court held that § 5 "only pre-empted state and federal rulemaking bodies from mandating particular cautionary statements and did not pre-empt state law damages actions."

(Footnote continued on following page)

Cipollone also must be read in the context of this Court's previous rulings in *Ouellette* and *Mortier,* the latter being the only Supreme Court decision to have addressed the pre-emption issue in the context of FIFRA. These decisions affirm that FIFRA pre-emption of state failure to warn claims should be essentially a settled issue; any former split of authority on the FIFRA issue is now resolved in favor of pre-emption.[13] Accordingly, no special or important reason exists for this Court to review the FIFRA pre-emption issue determined by the Tenth Circuit.

III. THE TENTH CIRCUIT'S APPLICATION OF 7 U.S.C. § 136v(b) TO THE FACTS OF THIS CASE DOES NOT RAISE AN ISSUE AS TO RETROACTIVE STATUTORY APPLICATION, IS CONSISTENT WITH ESTABLISHED SUPREME COURT PRECEDENT, AND, AS A MATTER OF STATE LAW INTERPRETATION, HAS NO NATIONAL SIGNIFICANCE.

Completely apart from its pre-emption argument, Petitioner urges this Court to grant certiorari on the issue of whether the Tenth Circuit should have applied the codification of FIFRA existing prior to the 1972 amendments to the statute. *See* Petition at 3, 23-24 (the wood treatment operation conducted by Petition-

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(Footnote continued from previous page)

Cipollone, 112 S. Ct. at 2618-19 (footnote omitted). Section 5 of the 1965 Act is dissimilar to the pre-emptive language set forth in FIFRA, 7 U.S.C. § 136v(b). For example, § 136v(b) is entitled "Uniformity," which emphasizes the purpose of the federal *program* governing pesticide labeling. In contrast, § 5(b) of the 1965 Act was captioned "Pre-emption," a title that should be interpreted as describing the complete scope of pre-emption under the 1965 Act.

[13]In a post-*Cipollone* FIFRA decision, the Nevada Supreme Court recognized *Cipollone,* but relied primarily on this Court's opinion in *Mortier* to find that FIFRA impliedly pre-empted state law failure to warn claims through occupation of the field of pesticide labeling. *Davidson v. Velsicol Chem. Corp.,* No. 22464, 1992 Nev. LEXIS 123 (Nev. August 12, 1992). *See also Yowell v. Chevron Chem. Co.,* No. 17605, 1992 Mo. App. LEXIS 1193 (Mo. Ct. App. July 13, 1992) (also finding implied pre-emption after *Cipollone*).

er's predecessor existed on the property from 1960-72). Holding that Petitioner's *claims* did not arise under Colorado law until the late 1980s, the Tenth Circuit applied the current codification of FIFRA. *Arkansas-Platte*, 959 F.2d at 160.

Respondents note at the outset that Petitioner's so-called retroactivity issue was not addressed by this Court in the *Cipollone* decision. Thus, in the event that the Court's disposition of this case is similar to that in *Papas*, or if the Court intends to grant certiorari on the pre-emption issue, Respondents respectfully suggest that Petitioner has demonstrated no basis upon which the Tenth Circuit's application of the current FIFRA should be disturbed. This aspect of the decision below should remain unaffected by this Court's disposition of the remainder of the Petition.

A. THE TENTH CIRCUIT CORRECTLY DETERMINED THAT THE VERSION OF FIFRA TO BE APPLIED WAS AN ISSUE OF STATE LAW INTERPRETATION AND THAT RETROACTIVITY WAS NOT AN ISSUE IN THIS CASE.

Petitioner contends that the pre-1972 version of FIFRA should apply to the facts of this case even though it has asserted causes of action based upon post-1972 Colorado law.[14] *See* Petition at 20. The Tenth Circuit's application of the current codification of FIFRA to Petitioner's 1987 failure to warn claims, however, does not represent a retroactive application of FIFRA. As the Tenth Circuit correctly recognized:

> The issue here, however, does not concern retroactivity, but rather when the plaintiff's cause of action arose. Our examination of the claim leads us to conclude it arose after 1972. AP&G acquired its property in 1985, found the property contaminated in 1987, and filed suit in 1989.

Arkansas-Platte, 959 F.2d at 160.

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[14]For example, Petitioner's failure to warn claim is based in part on strict liability, a cause of action that was not adopted by the Supreme Court of Colorado until 1975. *See Hiigel v. General Motors Corp.*, 190 Colo. 57, 544 P.2d 983 (1975).

The point in time at which Petitioner's failure to warn claims arose is a matter of state law interpretation. The federal District Court of Colorado, having jurisdiction over Petitioner's claims based upon diversity of citizenship, was bound to apply Colorado law to determine when the claims arose. *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers Inc.*, 748 F. Supp. 1474, 1477 (D. Colo. 1990). The district court held that the post-1972 version of FIFRA, 7 U.S.C. § 136v(b), should apply. The Tenth Circuit, even more explicitly, reached the same result as the district court. *Arkansas-Platte*, 959 F.2d at 160. The Tenth Circuit's opinion should not be disturbed in this regard.[15]

[15]Application of pre-1972 FIFRA would not change the Tenth Circuit's conclusion that state law failure to warn claims were pre-empted. This Court has previously noted that as first enacted in 1947, FIFRA was primarily a licensing and labeling statute. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). Although the 1972 amendments provided substantial changes governing the *use* of pesticides (*see, e.g.*, 7 U.S.C. §§ 136b and 136c), there were few changes in the labeling scheme imposed by the pre-1972 version of the Act. *See generally Ruckelshaus*, 467 U.S. at 991-92 (recognizing the congressional intent that "[t]he [1972] amendments transformed FIFRA from a labeling law into a comprehensive regulatory statute"). The regulation of and restrictions upon manufacturers' labels was very stringent under both the pre-1972 law and the post-1972 law. *See Ruckelshaus*, 467 U.S. at 991 (specifically noting that §§ 2(u)(2) and 3(a)(3) of the 1947 Act set forth the types of information necessary for proper labeling of a registered pesticide including warnings to prevent harm to people, animals, and plants).

None of the four cases cited by Petitioner for the proposition that FIFRA did not pre-empt state tort law warning claims prior to the 1972 amendments actually supports that proposition. *See In re "Agent Orange" Product Liab. Litig.*, 635 F.2d 987, 995 n.14 (2d Cir. 1980), *cert. denied sub nom. Chapman v. Dow Chem. Co.*, 454 U.S. 1128 (1981) (noting in dicta that FIFRA does not displace the *entire* body of state product liability laws, a proposition which Respondents concede); *Hubbard-Hall Chem. Co. v. Silverman*, 340 F.2d 402, 405 (1st Cir. 1965) (specifically noting that the pre-emption issue was not argued); *Griffin v. Planters Chem. Corp.*, 302 F. Supp. 937 (D.S.C. 1969) (addressing regulatory compliance as a defense, but not addressing pre-emption directly); *Muncy v. Magnolia Chem. Co.*, 437 S.W.2d 15 (Texas App. 1968) (not raising the issue of pre-emption).

B. THE TENTH CIRCUIT'S APPLICATION OF 7 U.S.C. § 136v(b) TO THE FACTS OF THIS CASE IS CORRECT AND IN ACCORDANCE WITH ESTABLISHED SUPREME COURT AUTHORITY.

To the extent that the concept of retroactivity has any relevance to the facts of this case, the Tenth Circuit correctly applied the long-standing rule of this Court that a statute is not rendered retroactive because the facts upon which it operates occurred before its effective date:

> Even were we to assume plaintiff's cause of action ripened prior to 1972, we have said it is "fundamental" that "a statute is not rendered retroactive because the facts or requisites upon which its subsequent action depends are drawn from a time antecedent to the enactment."

Arkansas-Platte, 959 F.2d at 160 (quoting *Lohf v. Casey*, 466 F.2d 618, 620 (10th Cir. 1972), citing *Cox v. Hart*, 260 U.S. 427 (1922)). The Tenth Circuit's conclusion also is consistent with this Court's directive that a court must apply the law in effect at the time it renders its decision, unless to do so would result in manifest injustice. *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974).

C. CONTRARY TO PETITIONER'S ASSERTION, THERE IS NO SPLIT OF AUTHORITY ON WHETHER 7 U.S.C. § 136v(b) SHOULD APPLY.

The federal courts that have addressed the issue have all concluded that 7 U.S.C. § 136v(b) applies to alleged pre-1972 acts and omissions. *See Arkansas-Platte*, 959 F.2d at 160; *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799, 811 (M.D. Fla. 1989) (applying *Bradley* to confirm that § 136v(b) correctly applies to pre-1972 exposure to pesticides when determining whether FIFRA pre-empts failure to warn claims premised on state law). Contrary to Petitioner's unsupported contentions, *see* Petition at 22-23, there is no confusion among the circuits or split of authority on the issue of whether 7 U.S.C. § 136v(b) should apply to the facts of this case.

Moreover, both *Kennan* and the Tenth Circuit correctly recognized that whether the pesticide exposure occurred prior to 1972 would "not negate the fact that a jury award today would constitute regulation by causing manufacturers to change their labels." *Arkansas-Platte*, 959 F.2d at 161 (quoting *Kennan*, 717 F. Supp. at 811). Thus, the only courts to address the issue are in agreement that application of 7 U.S.C. § 136v(b) to alleged pre-1972 acts or omissions does not constitute impermissible retroactive application of the statute.

D. PETITIONER HAS MISINTERPRETED AND MISAPPLIED § 4(e) OF THE 1972 LEGISLATIVE DIRECTIVE.

Most egregious, among all of Petitioner's arguments related to "retroactivity," is its contention that § 4(e) of the 1972 legislation[16] constitutes a congressional directive that the entire legislation have prospective application only. Petitioner's analysis of the statute is patently incorrect and taken wholly out of context. To the contrary, the express congressional purpose of § 4 was only to make certain provisions within the Act "effective gradually over a four-year period because of its complexity and problems involved. . . ." S. Rep. No. 92-838, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4060. As *Kennan* expressly stated: "There is no indication that Congress intended 7 U.S.C. § 137(b) [sic] to apply only to cases arising after the enactment of the statute." 717 F. Supp. at 811.

Section 4(e) must be read in the context of the remainder of § 4, including, in particular, §§ 4(c) and (d). The latter sections describe the new programs and other statutory modifications enacted by the 1972 legislation. For example, the 1972 Act created both criminal and civil penalties and liabilities to third persons. *See, e.g.*, 7 U.S.C. § 1361 (criminal and civil penalties) and 7 U.S.C. § 136m (liability to third party purchasers of pesticides who suffer loss as a result of a registration suspension or cancel-

[16]Pub. L. No. 92-516.

lation). Section 4(e), read in context with those provisions, simply indicates that, for example, the criminal and civil liabilities created by FIFRA, even though part of the October 21, 1972 enactment, would not become effective until the expiration of the time period specified in § 4.[17] Section 4(e), therefore, merely provided for and governed the phased-in implementation of certain portions of the 1972 legislation as to which Congress directed that regulations be promulgated within a specified period of time. To construe § 4(e) as somehow pertaining to state common-law claims is to take that portion of the legislative directive wholly out of context and is grossly inconsistent with the plain language of § 4 when read in its entirety.

The Tenth Circuit correctly stated that this case "does not concern retroactivity." 959 F.2d at 160. Petitioner has identified no basis upon which this conclusion should be disturbed. The applicability of the post-1972 codification of FIFRA is a necessary result from the undisputed determination, as a matter of Colorado law, that Petitioner's claims did not arise until the late-1980s. Certiorari should be denied on this issue.

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[17]Both U.S.C.A. and U.S.C.S. annotators agree:

> Effective date. [referring to indemnity section, 7 U.S.C. § 136m] Section effective at the close of October 21, 1972, except if regulations are necessary for the implementation of any provision that becomes effective on October 21, 1972, and continuation in effect of the provisions of subchapter I of this chapter and regulations thereunder as in effect prior to October 21, 1972, until superseded by provisions of Pub. L. 92-516 and regulations thereunder, see section 4 of Pub. L. 92-516, set out as a note under section 136 of this title.

7 U.S.C.A. § 136m (Historical Note). Also:

> Effective date of section: [referring to indemnity section, 7 U.S.C. § 136m] For effective date of this section, see § 4 of Act Oct. 21, 1972, P.L. 92-516, 86 Stat. 998, set out at 7 U.S.C.S. § 136 note.

7 U.S.C.S. § 136m (History; Ancillary Laws and directives). *See also Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 862 n.4 (1990) ("Congress may delay the effective date of a statute for many reasons having nothing to do with retroactivity, particularly if the statute is complex") (White, J., dissenting).

CONCLUSION

1. The Tenth Circuit's application of an implied pre-emption analysis to 7 U.S.C. § 136v(b) is consistent with this Court's recent decisions in *Ouellette, Mortier, Gade, Cipollone,* and numerous other long-standing pre-emption decisions of this Court. There is no divisive conflict between United States Courts of Appeals on the specific issue of FIFRA pre-emption of state failure to warn claims. To the contrary, following this Court's decisions in *Ouellette* and *Mortier,* all United States Courts of Appeals that have considered the question of FIFRA pre-emption have found that FIFRA pre-empts state law claims based on an alleged failure to warn.

No special or important reason warrants this Court's review or remand of the Tenth Circuit Court of Appeals' decision on this issue. Respondents have fully briefed the effect of this Court's *Gade* and *Cipollone* decisions, which post-date the Tenth Circuit's decision below. These decisions are entirely consistent with the Tenth Circuit's opinion. Accordingly, the Petition for writ of certiorari is properly denied on the question of whether FIFRA pre-empts state law failure to warn claims.

2. Petitioner's argument regarding application of the current codification of 7 U.S.C. § 136v(b) to the facts of this case is completely distinct from, and independent of, the resolution of Petitioner's claims regarding FIFRA pre-emption. The Tenth Circuit's application of 7 U.S.C. § 136v(b) as it existed on the date when Petitioner's cause of action arose under Colorado law is a matter of state law interpretation, does not raise an issue as to retroactive statutory application, is in accordance with all other courts which have addressed this specific issue, and is consistent with established Supreme Court precedent. No reason warrants this Court's review of the Tenth Circuit's application of 7 U.S.C. § 136v(b) to the facts of this case. Accordingly, the Petition for writ of certiorari should be denied on this question as well.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER,
CLERK OF THE COURT

AREA CODE 202
479-3011

August 26, 1992

David A. Bailey
Parcel, Mauro, Hultin, Spaanstra
1801 California Street
Denver, CO 80202-2636

C. Michael Montgomery
Montgomery, Green, Jarvis, et al.
1050 Seventeenth Street, Ste. 2300
Denver, CO 80265

Re: **Arkansas-Platte and Gulf Partnership**
v. The Dow Chemical Company and
Van Waters & Rogers, Inc.
No. 92-203

Dear Gentlemen:

Your requests of August 18, 1992 and August 19, 1992 for an extension of time within which to file a brief in opposition to the petition for a writ of certiorari in the above-entitled case has been granted; the time has been extended to and including September 15, 1992 for all respondents.

Very truly yours,

WILLIAM K. SUTER, Clerk

By

Christopher W. Vasil
Deputy Clerk

gj
cc: Walter H. Sergeant, II

PART 156—LABELING REQUIREMENTS FOR PESTICIDES AND DEVICES

AUTHORITY: 7 U.S.C. 136-136y.

§ 156.10 Labeling requirements.

(a) *General*—(1) *Contents of the label.* Every pesticide products shall bear a label containing the information specified by the Act and the regu-

lations in this part. The contents of a label must show clearly and prominently the following:

(i) The name, brand, or trademark under which the product is sold as prescribed in paragraph (b) of this section;

(ii) The name and address of the producer, registrant, or person for whom produced as prescribed in paragraph (c) of this section;

(iii) The net contents as prescribed in paragraph (d) of this section;

(iv) The product registration number as prescribed in paragraph (e) of this section;

(v) The producing establishment number as prescribed in paragraph (f) of this section;

(vi) An ingredient statement as prescribed in paragraph (g) of this section;

(vii) Warning or precautionary statements as prescribed in paragraph (h) of this section;

(viii) The directions for use as prescribed in paragraph (i) of this section; and

(ix) The use classification(s) as prescribed in paragraph (j) of this section.

(2) *Prominence and legibility.* (i) All words, statements, graphic representations, designs or other information required on the labeling by the Act or the regulations in this part must be clearly legible to a person with normal vision, and must be placed with such conspicuousness (as compared with other words, statements, designs, or graphic matter on the labeling) and expressed in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

(ii) All required label text must:

(A) Be set in 6-point or larger type;

(B) Appear on a clear contrasting background; and

(C) Not be obscured or crowded.

(3) *Language to be used.* All required label or labeling text shall appear in the English language. However, the Agency may require or the applicant may propose additional text in other languages as is considered necessary to protect the public. When additional text in another language is necessary, all labeling requirements will be applied equally to both the English and other-language versions of the labeling.

(4) *Placement of Label*—(i) *General.* The label shall appear on or be securely attached to the immediate container of the pesticide product. For purposes of this Section, and the misbranding provisions of the Act, "securely attached" shall mean that a label can reasonably be expected to remain affixed during the foreseeable conditions and period of use. If the immediate container is enclosed within a wrapper or outside container through which the label cannot be clearly read, the label must also be securely attached to such outside wrapper or container, if it is a part of the package as customarily distributed or sold.

(ii) *Tank cars and other bulk containers*—(A) *Transportation.* While a pesticide product is in transit, the appropriate provisions of 49 CFR parts 170–189, concerning the transportation of hazardous materials, and specifically those provisions concerning the labeling, marking and placarding of hazardous materials and the vehicles carrying them, define the basic Federal requirements. In addition, when any registered pesticide product is transported in a tank car, tank truck or other mobile or portable bulk container, a copy of the accepted label must be attached to the shipping papers, and left with the consignee at the time of delivery.

(B) *Storage.* When pesticide products are stored in bulk containers, whether mobile or stationary, which remain in the custody of the user, a copy of the label of labeling, including all appropriate directions for use, shall be securely attached to the container in the immediate vicinity of the discharge control valve.

(5) *False or misleading statements.* Pursuant to section 2(q)(1)(A) of the Act, a pesticide or a device declared subject to the Act pursuant to § 153.240, is misbranded if its labeling is false or misleading in any particular including both pesticidal and non-pesticidal claims. Examples of statements or representations in the labeling which constitute misbranding include:

(i) A false or misleading statement concerning the composition of the product;

(ii) A false or misleading statement concerning the effectiveness of the product as a pesticide or device;

(iii) A false or misleading statement about the value of the product for purposes other than as a pesticide or device;

(iv) A false or misleading comparison with other pesticides or devices;

(v) Any statement directly or indirectly implying that the pesticide or device is recommended or endorsed by any agency of the Federal Government;

(vi) The name of a pesticide which contains two or more principal active ingredients if the name suggests one or more but not all such principal active ingredients even though the names of the other ingredients are stated elsewhere in the labeling;

(vii) A true statement used in such a way as to give a false or misleading impression to the purchaser;

(viii) Label disclaimers which negate or detract from labeling statements required under the Act and these regulations;

(ix) Claims as to the safety of the pesticide or its ingredients, including statements such as "safe," "nonpoisonous," "noninjurious," "harmless" or "nontoxic to humans and pets" with or without such a qualifying phrase as "when used as directed"; and

(x) Non-numerical and/or comparative statements on the safety of the product, including but not limited to:

(A) "Contains all natural ingredients";

(B) "Among the least toxic chemicals known"

(C) "Pollution approved"

(6) *Final printed labeling.* (i) Except as provided in paragraph (a)(6)(ii) of this section, final printed labeling must be submitted and accepted prior to registration. However, final printed labeling need not be submitted until draft label texts have been provisionally accepted by the Agency.

(ii) Clearly legible reproductions or photo reductions will be accepted for unusual labels such as those silkscreened directly onto glass or metal containers or large bag or drum labels. Such reproductions must be of microfilm reproduction quality.

(b) *Name, brand, or trademark.* (1) The name, brand, or trademark under which the pesticide product is sold shall appear on the front panel of the label.

(2) No name, brand, or trademark may appear on the label which:

(i) Is false or misleading, or

(ii) Has not been approved by the Administrator through registration or supplemental registration as an additional name pursuant to § 152.132.

(c) Name and address of producer, registrant, or person for whom produced. An unqualified name and address given on the label shall be considered as the name and address of the producer. If the registrant's name appears on the label and the registrant is not the producer, or if the name of the person for whom the pesticide was produced appears on the label, it must be qualified by appropriate wording such as "Packed for * * *," "Distributed by * * *," or "Sold by * * *" to show that the name is not that of the producer.

(d) *Net weight or measure of contents.* (1) The net weight or measure of content shall be exclusive of wrappers or other materials and shall be the average content unless explicitly stated as a minimum quantity.

(2) If the pesticide is a liquid, the net content statement shall be in terms of liquid measure at 68° F (20°C) and shall be expressed in conventional American units of fluid ounces, pints, quarts, and gallons.

(3) If the pesticide is solid or semisolid, viscous or pressurized, or is a mixture of liquid and solid, the net content statement shall be in terms of weight expressed as avoirdupois pounds and ounces.

(4) In all cases, net content shall be stated in terms of the largest suitable units, i.e., "1 pound 10 ounces" rather than "26 ounces."

(5) In addition to the required units specified, net content may be expressed in metric units.

(6) Variation above minimum content or around an average is permissible only to the extent that it represents deviation unavoidable in good manufacturing practice. Variation below a stated minimum is not permitted. In no case shall the average con-

tent of the packages in a shipment fall below the stated average content.

(e) *Product registration number.* The registration number assigned to the pesticide product at the time of registration shall appear on the label, preceded by the phrase "EPA Registration No.," or the phrase "EPA Reg. No." The registration number shall be set in type of a size and style similar to other print on that part of the label on which it appears and shall run parallel to it. The registration number and the required identifying phrase shall not appear in such a manner as to suggest or imply recommendation or endorsement of the product by the Agency.

(f) *Producing establishments registration number.* The producing establishment registration number preceded by the phrase "EPA Est.", of the final establishment at which the product was produced may appear in any suitable location on the label or immediate container. It must appear on the wrapper or outside container of the package if the EPA establishment registration number on the immediate container cannot be clearly read through such wrapper or container.

(g) *Ingredient statement*—(1) *General.* The label of each pesticide product must bear a statement which contains the name and percentage by weight of each active ingredient, the total percentage by weight of all inert ingredients; and if the pesticide contains arsenic in any form, a statement of the percentages of total and water-soluble arsenic calculated as elemental arsenic. The active ingredients must be designated by the term "active ingredients" and the inert ingredients by the term "inert ingredients," or the singular forms of these terms when appropriate. Both terms shall be in the same type size, be aligned to the same margin and be equally prominent. The statement "Inert Ingredients, none" is not required for pesticides which contain 100 percent active ingredients. Unless the ingredient statement is a complete analysis of the pesticide, the term "analysis" shall not be used as a heading for the ingredient statement.

(2) *Position of ingredient statement.* (i) The ingredient statement is normally required on the front panel of the label. If there is an outside container or wrapper through which the ingredient statement cannot be clearly read, the ingredient statement must also appear on such outside container or wrapper. If the size or form of the package makes it impracticable to place the ingredient statement on the front panel of the label, permission may be granted for the ingredient statement to appear elsewhere.

(ii) The text of the ingredient statement must run parallel with other text on the panel on which it appears, and must be clearly distinguishable from and must not be placed in the body of other text.

(3) *Names to be used in ingredient statement.* The name used for each ingredient shall be the accepted common name, if there is one, followed by the chemical name. The common name may be used alone only if it is well known. If no common name has been established, the chemical name alone shall be used. In no case will the use of a trademark or proprietary name be permitted unless such name has been accepted as a common name by the Administrator under the authority of section 25(c)(6).

(4) *Statements of percentages.* The percentages of ingredients shall be stated in terms of weight-to-weight. The sum of percentages of the active and the inert ingredients shall be 100. Percentages shall not be expressed by a range of values such as "22-25%." If the uses of the pesticide product are expressed as weight of active ingredient per unit area, a statement of the weight of active ingredient per unit volume of the pesticide formulation shall also appear in the ingredient statement.

(5) *Accuracy of stated percentages.* The percentages given shall be as precise as possible reflecting good manufacturing practice. If there may be unavoidable variation between manufacturing batches, the value stated for each active ingredient shall be the lowest percentage which may be present.

(6) *Deterioration.* Pesticides which change in chemical composition significantly must meet the following labeling requirements:

(i) In cases where it is determined that a pesticide formulation changes chemical composition significantly, the product must bear the following statement in a prominent position on the label: "Not for sale or use after [date]."

(ii) The product must meet all label claims up to the expiration time indicated on the label.

(7) *Inert ingredients.* The Administrator may require the name of any inert ingredient(s) to be listed in the ingredient statement if he determines that such ingredient(s) may pose a hazard to man or the environment.

(h) *Warnings and precautionary statements.* Required warnings and precautionary statements concerning the general areas of toxicological hazard including hazard to children, environmental hazard, and physical or chemical hazard fall into two groups; those required on the front panel of the labeling and those which may appear elsewhere. Specific requirements concerning content, placement, type size, and prominence are given below.

(1) *Required front panel statements.* With the exception of the child hazard warning statement, the text required on the front panel of the label is determined by the Toxicity Category of the pesticide. The category is assigned on the basis of the highest hazard shown by any of the indicators in the table below:

Hazard indicators	Toxicity categories			
	I	II	III	IV
Oral LD_{50}	Up to and including 50 mg/kg	From 50 thru 500 mg/kg	From 500 thru 5000 mg/kg	Greater than 5000 mg/kg
Inhalation LC_{50}	Up to and including .2 mg/liter	From .2 thru 2 mg/liter	From 2 thru 20 mg/liter	Greater than 20 mg/liter
Dermal LD_{50}	Up to and including 200 mg/kg	From 200 thru 2000	From 2,000 thru 20,000	Greater than 20,000
Eye effects	Corrosive, corneal opacity not reversible within 7 days	Corneal opacity reversible within 7 days; irritation persisting for 7 days	No corneal opacity, irritation reversible within 7 days	No irritation
Skin effects	Corrosive	Severe irritation at 72 hours	Moderate irritation at 72 hours	Mild or slight irritation at 72 hours

(i) *Human hazard signal word*—(A) *Toxicity Category I.* All pesticide products meeting the criteria of Toxicity Category I shall bear on the front panel the signal word "Danger." In addition if the product was assigned to Toxicity Category I on the basis of its oral, inhalation or dermal toxicity (as distinct from skin and eye local effects) the word "Poison" shall appear in red on a background of distinctly contrasting color and the skull and crossbones shall appear in immediate proximity to the word "poison."

(B) *Toxicity Category II.* All pesticide products meeting the criteria of Toxicity Category II shall bear on the front panel the signal word "Warning."

(C) *Toxicity Category III.* All pesticide products meeting the criteria of Toxicity Category III shall bear on the front panel the signal word "Caution."

(D) *Toxicity Category IV.* All pesticide products meeting the criteria of Toxicity Category IV shall bear on the front panel the signal word "Caution."

(E) *Use of signal words.* Use of any signal word(s) associated with a higher Toxicity Category is not permitted except when the Agency determines that such labeling is necessary to prevent unreasonable adverse effects on man or the environment. In no case shall more than one human hazard signal word appear on the front panel of a label.

(ii) *Child hazard warning.* Every pesticide product label shall bear on the front panel the statement "keep out of reach of children." Only in cases where the likelihood of contact with children during distribution, marketing, storage or use is demonstrated by the applicant to be extremely remote, or if the nature of the pesticide is such

that it is approved for use on infants or small children, may the Administrator waive this requirement.

(iii) *Statement of practical treatment*—(A) *Toxicity Category I.* A statement of practical treatment (first aid or other) shall appear on the front panel of the label of all pesticides falling into Toxicity Category I on the basis of oral, inhalation or dermal toxicity. The Agency may, however, permit reasonable variations in the placement of the statement of practical treatment is some reference such as "See statement of practical treatment on back panel" appears on the front panel near the word "Poison" and the skull and crossbones.

(B) *Other toxicity categories.* The statement of practical treatment is not required on the front panel except as described in paragraph (h)(1)(iii)(A) of this section. The applicant may, however, include such a front panel statement at his option. Statements of practical treatment are, however, required elsewhere on the label in accord with paragraph (h)(2) of this section if they do not appear on the front panel.

(iv) *Placement and prominence.* All the require front panel warning statements shall be grouped together on the label, and shall appear with sufficient prominence relative to other front panel text and graphic material to make them unlikely to be overlooked under customary conditions of purchase and use. The following table shows the minimum type size requirements for the front panel warning statements on various sizes of labels:

Size of label front panel in square inches	Points	
	Required signal word, all capitals	"Keep out of reach of children"
5 and under	6	6
Above 5 to 10	10	6
Above 10 to 15	12	8
Above 15 to 30	14	10
Over 30	18	12

(2) *Other required warnings and precautionary statements.* The warnings and precautionary statements as required below shall appear together on the label under the general heading "Precautionary Statements" and under appropriate subheadings of "Hazard to Humans and Domestic Animals," "Environmental Hazard" and "Physical or Chemical Hazard."

(i) *Hazard to humans and domestic animals.* (A) Where a hazard exists to humans or domestic animals, precautionary statements are required indicating the particular hazard, the route(s) of exposure and the precautions to be taken to avoid accident, injury or damage. The precautionary paragraph shall be immediately preceded by the appropriate hazard signal word.

(B) The following table depicts typical precautionary statements. These statements must be modified or expanded to reflect specific hazards.

Toxicity category	Precautionary statements by toxicity category	
	Oral, inhalation, or dermal toxicity	Skin and eye local effects
I	Fatal (poisonous) if swallowed [inhaled or absorbed through skin]. Do not breathe vapor [dust or spray mist]. Do not get in eyes, on skin, or on clothing [Front panel statement of practical treatment required.]	Corrosive, causes eye and skin damage [or skin irritation]. Do not get in eyes, on skin, or on clothing. Wear goggles or face shield and rubber gloves when handling. Harmful or fatal if swallowed. [Appropriate first aid statement required.]
II	May be fatal if swallowed [inhaled or absorbed through the skin]. Do not breathe vapors [dust or spray mist]. Do not get in eyes, on skin, or on clothing. [Appropriate first aid statements required.]	Causes eye [and skin] irritation. Do not get in eyes, on skin, or on clothing. Harmful if swallowed. [Appropriate first aid statement required.]
III	Harmful if swallowed [inhaled or absorbed through the skin]. Avoid breathing vapors [dust or spray mist]. Avoid contact with skin [eyes or clothing]. [Appropriate first aid statement required.]	Avoid contact with skin, eyes or clothing. In case of contact immediately flush eyes or skin with plenty of water. Get medical attention if irritation persists.
IV	[No precautionary statements required.]	[No precautionary statements required.]

(ii) *Environmental hazards.* Where a hazard exists to non target organisms excluding humans and domestic animals, precautionary statements are required stating the nature of the hazard and the appropriate precautions to avoid potential accident, injury or damage. Examples of the hazard statements and the circumstances under which they are required follow:

(A) If a pesticide intended for outdoor use contains an active ingredient with a mammalian acute oral LD_{50} of 100 or less, the statement "This Pesticide is Toxic to Wildlife" is required.

(B) If a pesticide intended for outdoor use contains an active ingredient with a fish acute LC_{50} of 1 ppm or less, the statement "This Pesticide is Toxic to Fish" is required.

(C) If a pesticide intended for outdoor use contains an active ingredient with an avian acute oral LD_{50} of 100 mg/kg or less, or a subacute dietary LC_{50} of 500 ppm or less, the statement "This Pesticide is Toxic to Wildlife" is required.

(D) If either accident history or field studies demonstrate that use of the pesticide may result in fatality to birds, fish or mammals, the statement "This pesticide is extremely toxic to wildlife (fish)" is required.

(E) For uses involving foliar application to agricultural crops, forests, or shade trees, or for mosquito abatement treatments, pesticides toxic to pollinating insects must bear appropriate label cautions.

(F) For all outdoor uses other than aquatic applications the label must bear the caution "Keep out of lakes, ponds or streams. Do not contaminate water by cleaning of equipment or disposal of wastes."

(iii) *Physical or chemical hazards.* Warning statements on the flammability or explosive characteristics of the pesticide are required as follows:

Flash point	Required text
(A) Pressurized Containers	
Flash point at or below 20° F. if there is a flashback at any valve opening	Extremely flammable. Contents under pressure. Keep away from fire, sparks, and heated surfaces. Do not puncture or incinerate container. Exposure to temperatures above 130° F may cause bursting.
Flash point above 20° F and not over 80° F or if the flame extension is more than 18 in long at a distance of 6 in from the flame	Flammable. Contents under pressure. Keep away from heat, sparks, and open flame. Do not puncture or incinerate container. Exposure to temperatures above 130° F may cause bursting.
All other pressurized containers	Contents under pressure. Do not use or store near heat or open flame. Do not puncture or incinerate container. Exposure to temperatures above 130° F may cause bursting.
(B) Nonpressurized Containers	
At or below 20° F	Extremely flammable. Keep away from fire, sparks, and heated surfaces.
Above 20° F and not over 80° F	Flammable. Keep away from heat and open flame.
Above 80° F and not over 150° F	Do not use or store near heat or open flame.

(i) *Directions for Use—(1) General requirements—(i) Adequacy and clarity of directions.* Directions for use must be stated in terms which can be easily read and understood by the average person likely to use or to supervise the use of the pesticide. When followed, directions must be adequate to protect the public from fraud and from personal injury and to prevent unreasonable adverse effects on the environment.

(ii) *Placement of directions for use.* Directions may appear on any portion of the label provided that they are conspicuous enough to be easily read by the user of the pesticide product. Directions for use may appear on printed or graphic matter which accompanies the pesticide provided that:

(A) If required by the Agency, such printed or graphic matter is securely attached to each package of the pesticide, or placed within the outside wrapper or bag;

(B) The label bears a reference to the directions for use in accompanying leaflets or circulars, such as "See directions in the enclosed circular:" and

(C) The Administrator determines that it is not necessary for such directions to appear on the label.

(iii) *Exceptions to requirement for direction for use.*—(A) Detailed directions for use may be omitted from labeling of pesticides which are intended for use only by manufacturers of products other than pesticide products in their regular manufacturing processes, provided that:

(*1*) The label clearly shows that the product is intended for use only in manufacturing processes and specifies the type(s) of products involved.

(*2*) Adequate information such as technical data sheets or bulletins, is available to the trade specifying the type of product involved and its proper use in manufacturing processes;

(*3*) The product will not come into the hands of the general public except after incorporation into finished products; and

(*4*) The Administrator determines that such directions are not necessary to prevent unreasonable adverse effects on man or the environment.

(B) Detailed directions for use may be omitted from the labeling of pesticide products for which sale is limited to physicians, veterinarians, or druggists, provided that:

(*1*) The label clearly states that the product is for use only by physicians or veterinarians;

(*2*) The Administrator determines that such directions are not necessary to prevent unreasonable adverse effects on man or the environment; and

(*3*) The product is also a drug and regulated under the provisions of the Federal Food, Drug and Cosmetic Act.

(C) Detailed directions for use may be omitted from the labeling of pesticide products which are intended for use only by formulators in preparing pesticides for sale to the public, provided that:

(*1*) There is information readily available to the formulators on the composition, toxicity, methods of use, applicable restrictions or limitations, and effectiveness of the product for pesticide purposes;

(*2*) The label clearly states that the product is intended for use only in manufacturing, formulating, mixing, or repacking for use as a pesticide and specifies the type(s) of pesticide products involved;

(*3*) The product as finally manufactured, formulated, mixed, or repackaged is registered; and

(*4*) The Administrator determines that such directions are not necessary to prevent unreasonable adverse effects on man or the environment.

(2) *Contents of Directions for Use.* The directions for use shall include the following, under the headings "Directions for Use":

(i) The statement of use classification as prescribed in paragraph (j) of this section immediately under the heading "Directions for Use."

(ii) Immediately below the statement of use classification, the statement "It is a violation of Federal law to use this product in a manner inconsistent with its labeling."

(iii) The site(s) of application, as for example the crops, animals, areas, or objects to be treated.

(iv) The target pest(s) associated with each site.

(v) The dosage rate associated with each site and pest.

(vi) The method of application, including instructions for dilution, if required, and type(s) of application apparatus or equipment required.

(vii) The frequency and timing of applications necessary to obtain effective results without causing unreasonable adverse effects on the environment.

(viii) Specific limitations on reentry to areas where the pesticide has been applied, meeting the requirements concerning reentry provided by 40 CFR part 170.

(ix) Specific directions concerning the storage and disposal of the pesticide and its container, meeting the requirements of 40 CFR part 165. These instructions shall be grouped and appear under the heading "Storage and Disposal." This heading must be set in type of the same minimum sizes as required for the child hazard warning. (See Table in § 162.10(h)(1)(iv))

(x) Any limitations or restrictions on use required to prevent unreasonable adverse effects, such as:

(A) Required intervals between application and harvest of food or feed crops.

(B) Rotational crop restrictions.

(C) Warnings as required against use on certain crops, animals, objects, or in or adjacent to certain areas.

(D) [Reserved]

(E) For restricted use pesticides, a statement that the pesticide may be applied under the direct supervision of a certified applicator who is not physically present at the site of application but nonetheless available to the person applying the pesticide, unless the Agency has determined that the pesticide may only be applied under the direct supervision of a certified applicator who is physically present.

(F) Other pertinent information which the Administrator determines to be necessary for the protection of man and the environment.

(j) *Statement of Use Classification.* By October 22, 1976, all pesticide products must bear on their labels a statement of use classification as described in paragraphs (j) (1) and (2) of this section. Any pesticide product for which some uses are classified for general use and others for restricted use shall be separately labeled according to the labeling standards set forth in this subsection, and shall be marketed as separate products with different registration numbers, one bearing directions only for general use(s) and the other bearing directions for restricted use(s) except that, if a product has both restricted use(s) and general use(s), both of these uses may appear on a product labeled for restricted use. Such products shall be subject to the provisions of paragraph (j)(2) of this section.

(1) *General Use Classification.* Pesticide products bearing directions for use(s) classified general shall be labeled with the exact words "General Classification" immediately below the heading "Directions for Use." And reference to the general classification that suggests or implies that the general utility of the pesticide extends beyond those purposes and uses contained in the Directions for Use will be considered a false or misleading statement under the statutory definitions of misbranding.

(2) *Restricted Use Classification.* Pesticide products bearing direction for use(s) classified restricted shall bear statements of restricted use classification on the front panel as described below:

(i) *Front panel statement of restricted use classification.* (A) At the top of the front panel of the label, set in type of the same minimum sizes as required for human hazard signal words (see table in paragraph (h)(1)(iv) of this section), and appearing with sufficient prominence relative to other text and graphic material on the front panel to make it unlikely to be overlooked under customary conditions of purchase and use, the statement "Restricted Use Pesticide" shall appear.

(B) Directly below this statement on the front panel, a summary statement of the terms of restriction imposed as a precondition to registration shall appear. If use is restricted to certified applicators, the following statement is required: "For retail sale to and use only by Certified Applicators or persons under their direct supervision and only for those uses covered by the Certified Applicator's certification." If, however, other regulatory restrictions are imposed, the Administrator will define the appropriate wording for the terms of restriction by regulation.

[40 FR 28268, July 3, 1975; 40 FR 32329, Aug. 1, 1975; 40 FR 36571, Aug. 21, 1975, as amended at 43 FR 5786, Feb. 9, 1978. Redesignated and amended at 53 FR 15991, 15999, May 4, 1988]

Supreme Court, U.S.
FILED
SEP 24 1992
OFFICE OF THE CLERK

No. 92-203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ARKANSAS-PLATTE & GULF PARTNERSHIP,
Petitioner,

v.

THE DOW CHEMICAL COMPANY and
VAN WATERS & ROGERS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 2

I. RESPONDENTS HAVE BEEN UNABLE TO SQUARE THE TENTH CIRCUIT'S IMPLIED PREEMPTION ANALYSIS WITH *CIPOLLONE*'S DIRECTIVE TO GIVE EXPRESS PREEMPTIVE PROVISIONS BOTH EXCLUSIVE AND NARROW EFFECT; MOREOVER, RESPONDENTS HAVE FAILED TO PROVIDE THIS COURT WITH ANY MEANINGFUL BASIS FOR GIVING THE TENTH CIRCUIT'S HOLDING OF IMPLIED PREEMPTION MORE, RATHER THAN LESS, DEFERENCE THAN WAS GIVEN TO THE ELEVENTH CIRCUIT'S NARROWER HOLDING OF PREEMPTION IN *PAPAS* 2

II. CONTRARY TO RESPONDENTS' CONTENTIONS, THERE IS A WIDESPREAD AND CONTINUING SPLIT OF AUTHORITY ON WHETHER AND TO WHAT EXTENT FIFRA PREEMPTS STATE COMMON-LAW TORT CLAIMS OF INADEQUATE LABELING OR FAILURE TO WARN 4

III. THIS COURT'S DECISIONS IN *CIPOLLONE* AND *MORTIER* DO NOT SUPPORT THE TENTH CIRCUIT'S BROAD HOLDING THAT FIFRA PREEMPTS STATE COMMON-LAW TORT CLAIMS OF INADEQUATE WARNING OR LABELING 7

IV. CONTRARY TO RESPONDENTS' CONTENTIONS, THE TENTH CIRCUIT'S EXTENSION OF THE CURRENT FIFRA'S PREEMPTIVE REACH TO BAR CLAIMS BASED ON PRE-1972 CONDUCT IS AN ESPECIALLY TROUBLING ASPECT OF THE HOLDING THAT WARRANTS REVIEW OR RECONSIDERATION 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases: Page

Bradley v. School Bd. of City of Richmond, 416 U.S. 696 (1974) 9

Burke v. The Dow Chem. Co., No. CV 90-3344, 1992 U.S. Dist. LEXIS 10575 (E.D. N.Y. July 16, 1992) 5, 6

Ciba-Geigy Corp. v. Alter, 309 Ark. 426 (1992) 6

Cipollone v. Liggett Group, Inc., 60 U.S.L.W. 4703 (U.S. June 24, 1992) ..... *passim*

Davidson v. Velsicol Chem. Corp., No. 22464, 1992 Nev. LEXIS 123 (Nev. Aug. 12, 1992) 6

Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984) 5, 6

International Paper Co. v. Ouellette, 479 U.S. 481 (1987) 5

National By-Products, Inc. v. Pope, No. 91-5665 (6th Cir. April 6, 1992) 5

Papas v. Upjohn Co., 926 F.2d 1019 (11th Cir. 1991), *cert. granted, judgment vacated, and case remanded sub nom. Papas v. Zoecon*, 60 U.S.L.W. 3878 (U.S. June 29, 1992) 2, 4, 5

Wisconsin Pub. Intervenor v. Mortier, 501 U.S. ——, 115 L.Ed.2d 532 (1991) 2, 7

Worm v. American Cyanamid Co., No. 91-1749, 1992 U.S. App. LEXIS 14154 (4th Cir. June 19, 1992) 6

Federal Statutes:

Federal Environmental Pesticide Control Act of 1972, 86 Stat. 973, Pub. L. No. 92-516 ..... 8, 9, 10

Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 61 Stat. 163 (1947), as amended, 7 U.S.C. §§ 136-136y ..... *passim*

United States Code:

7 U.S.C. § 136v(b) 3, 7, 8, 9

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PETITIONER'S REPLY BRIEF

There appears to be no dispute about the facts of this case or about the great national importance of the question of whether the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), as amended, preempts state common-law tort claims that are based on inadequate labeling of pesticide products or failure to warn about the harmful effects of such products. However, in their brief in opposition ("Opposition Brief"), respondents contend that review or reconsideration of the Tenth Circuit's decision below is nevertheless unwarranted, because (i) the Tenth Circuit's implied preemption analysis was consistent with the analytical framework set out in this Court's subsequent decision in *Cipollone v. Liggett Group, Inc.*, 60 U.S.L.W. 4703 (U.S. June 24, 1992), *see* Opposition Brief at 8-13, (ii) there is no "divisive" conflict regarding

FIFRA preemption in the courts below, *see id.* at 13-17, (iii) the Tenth Circuit's holding on preemption is supported by this Court's opinions in *Cipollone* and *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. ——, 115 L. Ed. 2d 532 (1991), *see* Opposition Brief at 17-22, and (iv) the Tenth Circuit's application of the current FIFRA to preempt claims based on pre-1972 conduct was correct and, in any event, is only a matter of state law interpretation. *See id.* at 22-27.[1] In this reply brief, petitioner Arkansas-Platte & Gulf Partnership ("AP&G") shall address those contentions seriatim.

ARGUMENT

I. RESPONDENTS HAVE BEEN UNABLE TO SQUARE THE TENTH CIRCUIT'S IMPLIED PREEMPTION ANALYSIS WITH *CIPOLLONE*'S DIRECTIVE TO GIVE EXPRESS PREEMPTIVE PROVISIONS BOTH EXCLUSIVE AND NARROW EFFECT; MOREOVER, RESPONDENTS HAVE FAILED TO PROVIDE THIS COURT WITH ANY MEANINGFUL BASIS FOR GIVING THE TENTH CIRCUIT'S HOLDING OF IMPLIED PREEMPTION MORE, RATHER THAN LESS, DEFERENCE THAN WAS GIVEN TO THE ELEVENTH CIRCUIT'S NARROWER HOLDING OF PREEMPTION IN *PAPAS*.

In the Petition, AP&G argued that the Tenth Circuit's implied preemption analysis in the instant case, like the Eleventh Circuit's similar analysis in *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991), *cert. granted, judgment vacated, and case remanded sub nom. Papas v. Zoecon*, 60 U.S.L.W. 3878 (U.S. June 29, 1992), cannot be reconciled with this Court's directive in *Cipollone* that express preemptive provisions are to be given both exclusive and narrow effect. *See* Petition at 9. Respondents

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[1] *See also id.* at i ("Questions Presented") para. 2 (attempting to recharacterize the second question presented in the petition for a writ of certiorari (the "Petition") as a question that involves an issue of state law).

do not dispute AP&G's contention that the Tenth Circuit's implied preemption analysis would violate such a directive. Instead, they simply deny that this Court, in *Cipollone*, ever said such a thing.[2]

AP&G respectfully submits that, though there may have been some disagreement about the wisdom of the holding, all of this Court's members acknowledged in *Cipollone* that the Court was, in fact, holding that express preemption provisions are to be given exclusive and narrow effect.[3] Moreover, though respondents argue that such a reading of *Cipollone* "effectively and *sub silentio* overrules a number of significant decisions of this Court," *see* Opposition Brief at 10, and further argues that "the pre-emption analysis set forth in *Cipollone* . . . should be limited to express pre-emption cases concerning relatively non-complex statutes," *see id.* at 12, those contentions, if at all meritorious, would seem only to constitute additional reasons for giving this Court another opportunity to elaborate upon the preemption analysis set forth in *Cipollone*.

In addition to pointing out that the Tenth Circuit's implied preemption analysis conflicts with the analysis

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[2] *See, e.g.*, Opposition Brief at 10-11 & n.6 ("Petitioner's assertion that *Cipollone* directs that preemption provisions must be given a 'narrow effect' is clearly erroneous," and, "contrary to Petitioner's argument, the presence of pre-emptive language in 7 U.S.C. § 136v (b) did not restrict the Tenth Circuit to an express pre-emption analysis").

[3] *See, e.g.*, 60 U.S.L.W. at 4707 (Stevens, J., for the Court), 4711 (Blackmun, J., concurring in the Court's principles that "[w]e resort to principles of implied pre-emption . . . only when Congress has been silent with respect to pre-emption" and "[w]e do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language"), 4714-15 (Scalia, J., criticizing the Court's "two new" principles that "express pre-emption provisions must be given the narrowest possible construction" and "[o]nce there is an express pre-emption provision . . . all doctrines of implied pre-emption are eliminated").

subsequently set out in *Cipollone*, the Petition also suggested that, at a minimum, this Court should permit the Tenth Circuit the same opportunity given to the Eleventh Circuit in *Papas* to reconsider its judgment in light of *Cipollone*. *See* Petition at 9-11. In their Opposition Brief, respondents make no argument to suggest that the Tenth Circuit's holding on preemption is entitled to any greater deference than the Eleventh Circuit's holding in *Papas*.[4] For reasons set forth more fully in the Petition and elsewhere in this reply brief, AP&G continues to believe that the issues raised in this case warrant this Court's review; however, at a minimum, this Court should, consistent with its treatment of *Papas*, grant the Petition, summarily vacate the judgment below, and remand the case to the Tenth Circuit for further consideration in light of *Cipollone*.

II. CONTRARY TO RESPONDENTS' CONTENTIONS, THERE IS A WIDESPREAD AND CONTINUING SPLIT OF AUTHORITY ON WHETHER AND TO WHAT EXTENT FIFRA PREEMPTS STATE COMMON-LAW TORT CLAIMS OF INADEQUATE LABELING OR FAILURE TO WARN.

AP&G's Petition set out, in considerable detail, the split of authority on whether and to what extent FIFRA preempts state common-law tort claims of inadequate labeling or failure to warn. *See* Petition at 12-17. In their Opposition Brief, respondents contend that there is no "divisive" conflict on the issue, because the leading

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[4] Respondents do say, somewhat cryptically, that, "unlike the Petition and Brief in Opposition before this Court in *Papas* . . . Petitioner and Respondents have fully briefed the issue of the consistency of the Tenth Circuit's opinion in [this case] with this Court's most recent pronouncements." *See* Opposition Brief at 7 n.4. Respondents seem to be suggesting that this Court should treat the Petition and Opposition Brief as briefs on the merits, and should summarily affirm the Tenth Circuit's holding, based primarily upon respondents' misstatement of the Court's own preemption analysis in *Cipollone*. Needless to say, AP&G believes that the Tenth Circuit's decision warrants more searching review.

case against preemption, *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984), (i) was "rejected" or "constructively overruled" by this Court in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), *see* Opposition Brief at 7, 14, (ii) "stands in isolation to four other Courts of Appeal" that have found preemption by FIFRA, *see id.* at 14, 15-16, and (iii) has been followed in just "a few" district courts that had "a strong desire" to preserve remedies for injured plaintiffs. *See id.* at 16-17.

In reply, AP&G would note the following. First, as this Court well knows, *Ouellette* did not overrule or reject *Ferebee*. *Ferebee* was, in fact, cited with approval in Justice Bluckmun's opinion in *Cipollone*, *see* 60 U.S.L.W. at 4712, and, as Judge Jack Weinstein recently observed, Ferebee "remains a leading case" on the issue of FIFRA preemption. *See Burke v. The Dow Chem. Co.*, No. CV 90-3344, 1992 U.S. Dist. LEXIS 10575 (E.D. N.Y. July 16, 1992).[5]

Second, of the fourt federal circuit court opinions that have allegedly "followed *Ouellette* in clearly and explicitly rejecting both *Ferebee*'s 'choice of reaction' analysis and its holding of no pre-emption," *see* Opposition Brief at 15, one was vacated by this Court, *see Papas*, a second was a two-page, unpublished opinion that never mentioned FIFRA or preemption and that merely summarily affirmed a district court order granting summary judgment on grounds that included, in the alternative, FIFRA preemption, *see National By-Products, Inc. v. Pope*, No. 91-5665 (6th Cir. April 6, 1992), and a third followed neither *Ferebee* nor the Tenth Circuit's holding in the instant case, but instead took an intermediate position,

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[5] AP&G would additionally note that, of the eighteen post-*Ferebee* cases cited in the Petition that found no preemption of common-law claims by FIFRA, seventeen, including opinions by eleven different federal district court judges and one state court of last resort, were decided after *Ouellette*.

finding preemption only to the extent that the establishment or enforcement of a common-law duty "would impose a labeling requirement inconsistent with those established by FIFRA." *See Worm v. American Cyanamid Co.*, No. 91-1749, 1992 U.S. App. LEXIS 14154 (4th Cir. June 19, 1992). In sum, there are currently three federal circuit court opinions on this preemption issue—*Ferebee*, *Worm*, and the Tenth Circuit's opinion below. All three are in conflict with one another.

Third, the "few" district court decisions that have continued to find no preemption of common-law claims by FIFRA include a substantial majority of the district court decisions cited by the parties. *See, e.g.*, Petition at 15 nn.6, 7 & 8 and accompanying text. Respondents' suggestion that those "few" decisions have been unduly influenced by a "strong desire" to preserve remedies to injured plaintiffs does not merit comment.

Finally, AP&G would note that respondents have cited the most recent cases on FIFRA preemption, but have not discussed their significance. First, there is now a split in the state courts of last resort as well as in the federal circuit courts regarding FIFRA preemption. *Compare Davidson v. Velsicol Chem. Corp.*, No. 22464, 1992 Nev. LEXIS 123 (Nev. Aug. 12, 1992) (holding that FIFRA impliedly [sic] preempts state common-law tort claims of inadequate labeling) *with Ciba-Geigy Corp. v. Alter*, 309 Ark. 426 (1992) (finding no preemption). Second, further guidance from this Court, beyond *Cipollone*, may be needed to resolve the conflict on this FIFRA preemption issue. *Compare Burke* (applying the *Cipollone* analysis and finding a limited area of express preemption of claims involving EPA-approved labels, but refusing to find any implied preemption) *with Davidson* (finding *Cipollone* unhelpful, and proceeding to hold that FIFRA does not expressly preempt state tort claims, but does impliedly preempt them—a holding that the *Cipollone* analysis would seem to have foreclosed).

The widespread and continuing split of authority on this issue calls for resolution by this Court.

III. THIS COURT'S DECISIONS IN *CIPOLLONE* AND *MORTIER* DO NOT SUPPORT THE TENTH CIRCUIT'S BROAD HOLDING THAT FIFRA PREEMPTS STATE COMMON-LAW TORT CLAIMS OF INADEQUATE WARNING OR LABELING.

Respondents contend that this Court's decision in *Cipollone* supports the Tenth Circuit's holding that, even in cases involving pesticide labels that may never have complied with regulatory requirements or been approved by a government agency, and even in cases involving labels on products that were sold and distributed prior to the comprehensive revision of FIFRA and the introduction of preemptive statutory language regarding labeling, FIFRA preempts tort claims of inadequate warning or labeling. *See* Opposition Brief at 20-21. Respondents' argument, which consists of a simple observation that there is some similar language in the express preemption clauses of the current FIFRA statute and the Public Health Cigarette Smoking Act of 1969, is, for now, sufficiently dealt with in the Petition's discussion regarding FIFRA's preemptive reach under the standards of *Cipollone*. *See* Petition at 24-27.

Respondents also contend that this Court's decision in *Mortier* "strongly supports" a finding that claims of inadequate warning are preempted by FIFRA. Respondents quote dicta from *Mortier* that appears to acknowledge that 7 U.S.C. § 136v(b) was intended to have a preemptive effect on state regulation of labeling and packaging, and they conclude that "*Mortier* makes clear this Court's position on the issue of FIFRA pre-emption of pesticide labeling [sic]." *See* Opposition Brief at 18-19. Of course, AP&G has never denied that 7 U.S.C. § 136v(b) has some preemptive effect in the area of labeling and packaging. What AP&G denies, and what *Mortier* plainly did not suggest, is that the express preemptive language of 7

U.S.C. § 136v(b) was intended to preempt state common-law tort claims based on inadequate labeling or warning.

IV. CONTRARY TO RESPONDENTS' CONTENTIONS, THE TENTH CIRCUIT'S EXTENSION OF THE CURRENT FIFRA'S PREEMPTIVE REACH TO BAR CLAIMS BASED ON PRE-1972 CONDUCT IS AN ESPECIALLY TROUBLING ASPECT OF THE HOLDING THAT WARRANTS REVIEW OR RECONSIDERATION.

The Tenth Circuit's decision below extended the preemptive reach of the *current* FIFRA to bar even tort claims that are based on the inadequacy of labels on, or warnings relating to, pesticide products that were distributed and sold prior to the enactment of the 1972 FIFRA legislation and its express preemptive provision at 7 U.S.C. § 136v(b). In essence, the court gave retroactive effect to the 1972 legislation to immunize manufacturers from liability for earlier wrongful acts and omissions. In their Opposition Brief, respondents seek to shelter this most questionable aspect of the Tenth Circuit's holding from this Court's review or the Tenth Circuit's reconsideration upon remand.

First, respondents assert that this "so-called retroactivity issue" was not "addressed" in *Cipollone*. *See* Opposition Brief at 23. In fact, as was noted in the Petition, *see* Petition at 11, *Cipollone* consistently applied the federal statute in effect at the time of the allegedly tortious acts and omissions to determine whether later-accruing common-law tort claims based on those acts and omissions would be preempted; the correctness of that approach was undisputed.

Second, respondents assert that applying current rather than pre-1972 FIFRA was correct as a matter of "state law interpretation" because AP&G's claims did not accrue under state law until 1987. *See* Opposition Brief at 23-24. However, as was recognized in *Cipollone*, the date on which the claims accrued under state law (for purposes of, for example, statutes of limitation) is irrelevant; the

federal statute to be applied in the preemption analysis is the one that governed the manufacturers' behavior at the time of their allegedly tortious conduct. *See* Petition at 11 n.3.[6]

Third, respondents assert that the application of current rather than pre-1972 FIFRA is consistent with this Court's established authority, citing *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 711 (1974). *See* Opposition Brief at 25. However, as is discussed in the Petition, *see* Petition at 11, 22-23, the dominant strand of this Court's decisions, including the decision in *Cipollone*, is to the contrary.

Fourth, respondents assert that, "contrary to petitioner's assertion, there is no split of authority on whether 7 U.S.C. § 136v(b) should apply." *See* Opposition Brief at 25. AP&G never said that there was such a split, though it did refer to "the confusion in the lower courts regarding the propriety of applying subsequent statutory amendments to prior conduct." *See* Petition at 22-23. That confusion is well illustrated by the Tenth Circuit's decision below.

Fifth, regarding AP&G's assertion that section 4(e) of the 1972 FIFRA legislation provides additional, express evidence that Congress intended that liability to third persons arising out of acts and omissions prior to the 1972 amendments would be governed by pre-1972 FIFRA, respondents speculate that "liability to any third person" in section 4(e) refers only to the government's obligation to indemnify pesticide owners for losses resulting from cancellation of the pesticide's registration. *See*

[6] Respondents' observation that AP&G's claims are based in part on the theory of strict liability, which was not recognized by the Colorado Supreme Court until after 1972, *see* Opposition Brief at 23 n.14, is also irrelevant. Judicial decisions, unlike statutes, generally operate retrospectively; there is nothing unfair, unusual, or inconsistent about applying post-1972 judicial decisions and pre-1972 statutory law to the claims in this case.

Opposition Brief at 26-27. However, respondents have provided no legislative history or other authority for that contention, or for any other contention that the words in section 4(e) of the 1972 legislation do not mean exactly what they say.

There is no basis for sheltering, from review or reconsideration, the Tenth Circuit's extension of the current FIFRA's preemptive reach to bar claims based on pre-1972 conduct.

CONCLUSION

The petition for a writ of certiorari should be granted. At a minimum, this Court should grant the petition, summarily vacate or reverse the judgment, and remand the case for further consideration in light of this Court's decision in *Cipollone*.

Respectfully submitted,

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